Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSON'S, INC.,
Petitioner,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO AND CLC; and LOCALS 44, 81, 367, 381, 555, 1105, 1439, 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 and 1442, UNITED FOOD & COMMERCIAL WORKERS UNION,
Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 3, 1999

QUESTION PRESENTED

Where collective bargaining agreements make contractual grievance-arbitration procedures applicable to certain claims arising under federal and state wage and hour laws, may unions and the employees they represent pursue such claims in federal court without first exhausting the applicable contractual dispute resolution procedures?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the United States Secretary of Labor and The Labor Policy Association filed briefs as amicus curiae in the court of appeals. Albertson's, Inc., is a publicly-held corporation organized under the laws of Delaware, with its principal place of business in Boise, Idaho. Albertson's operates a chain of retail grocery stores, primarily in the western, southwestern, and southeastern United States. There are no parent companies, subsidiaries or affiliates of Albertson's, Inc. that have publicly issued securities.

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Respondents.

Petition of Albertson's, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Albertson's, Inc. prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit rendered in this action on October 8, 1998.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 157 F.3d 758 and is reprinted in the Appendix ("App.") at 1a-9a. The decision of the United States District Court for the District of Idaho is not reported but is reprinted at App. 12a-42a.

JURISDICTION

The amended complaint in this action asserted claims under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201, and invoked federal jurisdiction under 28 U.S.C. §§ 1331 and 1337. In a memorandum decision dated March 10, 1997, the United States District Court for the District of Idaho denied Albertson's motion for partial summary judgment on count I of the amended complaint and granted the defendant unions' motion to dismiss that same count. App. 12a-42a. Pursuant to Fed. R. Civ. P. 54(b) and 58, the district court entered final judgment against Albertson's as to count I on April 30, 1997 (App. 43a-47a, 48a), and Albertson's filed a timely notice of appeal. The court of appeals issued its decision on October 8, 1998, and denied Albertson's motion for rehearing on November 6, 1998. App. 1a-9a; 10a-11a. This petition is being timely filed within 90 days of the latter date. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the Labor Management Relations Act, 29 U.S.C. § 185. The pertinent text of these statutes is set forth at App. 49a-51a.

STATEMENT OF THE CASE

The decision of the court of appeals squarely presents the question whether an employer can enforce a union's agreement, on behalf of its members, to attempt to resolve statutory wage and hour claims through a grievance/ arbitration procedure prior to bringing those same claims in court. This case thus raises an issue not presented in this Court's recent decisions in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), and *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991). Guidance from this Court is necessary because of the frequent inclusion in collective bargaining agreements of dispute resolution provisions covering statutory claims and the uncertainty that the court of appeals's decision has created regarding the enforceability of those provisions.

A. Background

Albertson's is a retail grocery chain that operated over 800 stores in 19 states at the time this suit was filed, including 76 stores in Washington and 184 stores in California. Approximately 28,000 of Albertson's 85,000 employees were covered by collective bargaining agreements with locals of the United Food and Commercial Workers International Union ("UFCW"). Although the size of Albertson's operations and workforce has increased since the lawsuit was filed, the collective bargaining agreements at issue in this action continue to cover most of Albertson's employees in California and Washington.

In order to ensure compliance with the Fair Labor Standards Act ("FLSA") and state wage and hour laws prohibiting uncompensated work by employees, commonly referred to as "off-the-clock" or "free" work, Albertson's has implemented a strict written policy against such work. Albertson's has also negotiated collective bargaining agreements with the UFCW locals representing its employees

expressly prohibiting off-the-clock work. Although the pertinent provisions of the various collective bargaining agreements vary somewhat, the following language, taken from one of the agreements at issue in this case, is typical:

> The employer shall be responsible for payment for all hours worked, and an employee shall only work those hours specifically authorized by the employer. Accordingly, it is intended that there shall be no "free or time off-the-clock" work practices under this Agreement. Any employee found by the Employer or the Union to be engaging in such practice shall be subject to discipline, which may include termination.

The collective bargaining agreements also typically require the signatory union to report promptly to Albertson's any violations of this provision or the working of unauthorized time.

Albertson's collective bargaining agreements with the UFCW locals contain broad dispute resolution provisions, which typically provide that "any grievance or dispute concerning the application or interpretation of any and all of the provisions" of the agreement shall be submitted to that agreement's dispute resolution procedures. These procedures require that disputes be submitted as grievances, and that disputes not resolved informally be submitted to arbitration. The district court below assumed for purposes of its decision that the grievance/arbitration provisions in the collective bargaining agreements at issue in this case were applicable to statutory off-the-clock work claims.[1]

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[1] The Court's decision in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), was not handed down until after the district court and court of appeals had issued their decisions in this case. Although neither the parties nor the courts below had the benefit of this Court's teaching in *Wright* that an agreement to arbitrate statutory claims must be "clear and unmistakable," 119 S. Ct. at 396, Albertson's presented substantial evidence in support of its partial summary judgment motion that, Albertson's submits, would meet that standard.

B. Albertson's Declaratory Judgment Action

On September 9, 1996, Albertson's filed this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). As later amended, count I of the complaint sought a declaratory judgment that various UFCW locals and the employees they represent breached their collective bargaining agreements by failing to submit statutory off-the-clock work claims to the negotiated grievance/arbitration process.[2] Shortly after Albertson's filed its complaint in this action, the UFCW sponsored the filing of lawsuits against Albertson's in federal court in California alleging violations of the FLSA and state wage and hour laws, in federal court in Florida alleging violation of the FLSA, and in state court in Washington alleging violation of that state's wage and hour laws.

Thereafter, Albertson's filed with the district court in this action a motion for partial summary judgment as to count I, contending that the employees represented by the UFCW locals were required by their collective bargaining agreements to submit their statutory claims for off-the-clock work to the mandatory grievance/arbitration procedures contained in

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Although the lower courts' assumption that statutory claims are covered by the agreements pretermits any need for this Court to consider the issue, a substantial question exists as to whether the same "clear and unmistakable" standard applies if the outcome of the grievance/arbitration procedure is not "final and binding" insofar as statutory claims are concerned, so that employees with such claims who are dissatisfied with the results of arbitration remain free to pursue their claims *de novo* in court. The considerations that led the Court to require that a collectively bargained waiver of a judicial forum be clear and unmistakable simply are not present when the agreement does not serve to waive a judicial forum for statutory claims, but rather serves only to require that the grievance/arbitration procedure be utilized before the judicial forum is invoked.

[2] The amended complaint contains three additional counts, none of which is at issue in this appeal.

those agreements before pursuing such claims in court. The defendant unions filed a motion to dismiss all four counts.

For purposes of its ruling on count I, the district court assumed that the dispute resolution procedures set forth in the collective bargaining agreements covered statutory wage and hour claims. App. 27a. The court began its analysis of the motions by acknowledging that "public policy favors the resolution of labor disputes through arbitration," citing the *Steelworkers Trilogy*.[3] App. 26a. The court nevertheless found that this Court had identified "two inherent conflicts" between the policy in favor of arbitration and preservation of an employee's right to pursue an FLSA claim: first, a perceived risk that a union might sacrifice an employee's interests for the greater good of the majority of those it represents, and second, a concern that arbitration is inferior to adjudication as a means of resolving statutory claims. Both "conflicts" were based on language from this Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981). The court summarily rejected the second suggestion, finding that concerns over the adequacy of arbitration had been "soundly repudiated by later Supreme Court cases." App. 29a (citing *Gilmer*, 500 U.S. at 30-33). However, despite finding "[t]he reasoning of the case law [to be] troubling in both its sweep and nature," App. 37a, the district court believed itself constrained to follow Supreme Court and Ninth Circuit precedent that questioned the adequacy of union representation in arbitration when statutory claims are at issue. App. 39a (citing *Barrentine*, *Gilmer*, and *Local 246 Util. Workers Union v. Southern Cal. Edison Co.*,

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[3] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

83 F.3d 292 (9th Cir. 1996)). The court therefore denied Albertson's motion for partial summary judgment and granted the unions' motion to dismiss as to count I, ruling that the locals and their members were not required to arbitrate their statutory off-the-clock work claims. App. 40a-41a. On April 30, 1997, pursuant to Fed. R. Civ. P. 54(b) and 58, the district court, acknowledging "the difficulty of this issue, and the split in the authorities," App. 45a, entered final judgment against Albertson's with respect to count I. App. 47a, 48a.

C. The Court Of Appeals Decision

On October 8, 1998, the court of appeals affirmed the district court based on what it described as "somewhat different reasoning." App. 2a. Without addressing the district court's assumption that the statutory wage and hour claims were covered by the contractual dispute resolution clauses, the court of appeals reasoned that this Court's decisions in *Barrentine* and *Alexander* established that claims arising out of a collective bargaining agreement are separate and distinct from those arising out of a statute such as the FLSA, and that the latter statute created for employees an independent right to pursue their claims in federal court notwithstanding that they might also have similar claims under a collective bargaining agreement. The court of appeals viewed this result as supported by this Court's decisions in *Gilmer* and *Livadas v. Bradshaw*, 512 U.S. 107 (1994), both of which had reemphasized the distinction between contractual and statutory claims. *Gilmer*, 500 U.S. at 35; *Livadas*, 512 U.S. at 127 n.21. The court of appeals concluded by holding that employees are entitled to take FLSA claims to court without regard to whether those claims may also be covered by a collective bargaining agreement's grievance/arbitration procedure. App. 9a.

In a petition for rehearing, Albertson's noted that the Ninth Circuit's decision appeared to be based on an

assumption that the outcome of the grievance/arbitration procedure would be final and binding, and argued that the court's rationale lost its force if the effect of the agreement on statutory wage and hour claims was only to require that employees exhaust the grievance/arbitration procedures before pursuing their claims in court.[4] The court denied Albertson's petition for rehearing without comment.

REASONS FOR GRANTING THE PETITION

This case presents an issue of great importance to employers and employees who are subject to or are negotiating collective bargaining agreements providing for the arbitration of statutory claims. By holding that employees may take statutory claims directly to court without first exhausting mandatory grievance/arbitration procedures applicable to such claims, the court of appeals misapplied this Court's prior decisions regarding the arbitrability of statutory claims and disregarded the strong preference for resolving claims according to the procedures agreed to by the parties to collective agreements. In *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), this Court held that a collectively bargained requirement that statutory claims be arbitrated would have to be clear and unmistakable, but did not reach the question whether such a requirement could be enforced. 119 S. Ct. at 397 & n.2. Because the courts below assumed for purposes of their decisions that the collective bargaining agreements at issue require the arbitration of statutory claims, this case squarely presents the

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[4] The collective bargaining agreements between Albertson's and the UFCW locals generally make the outcome of the grievance/arbitration process final and binding. Although it is Albertson's position that the process can be final and binding as to statutory claims as well as contractual disputes when the agreement to submit the former to the process is clear and unmistakable, Albertson's argues here, as it did in its alternative argument in the Ninth Circuit, only that *at the very least* the effect of the agreements is to require that statutory wage and hour claims be submitted to arbitration before they are pursued *de novo* in court.

question whether an agreement to submit statutory wage and hour claims to arbitration can be enforced.

The Ninth Circuit's ruling also conflicts with the rationale underlying the decision of the Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), which held that a collectively bargained agreement to arbitrate a statutory claim arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was enforceable.

I. The Ninth Circuit's Decision Erroneously Decides An Important Issue Regarding The Enforceability Of A Collectively Bargained Agreement To Resolve Statutory Claims Through Arbitration

A. The Ninth Circuit Misapplied This Court's Prior Decisions Regarding The Arbitrability Of Statutory Claims

The Ninth Circuit's ruling that employees cannot be required by a collective bargaining agreement to arbitrate their statutory wage and hour claims was based on its reading of this Court's decisions in *Alexander* and *Barrentine*.[5] In *Barrentine*, the Ninth Circuit noted, this Court had explained that although courts should defer to arbitral decisions concerning contractual rights, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." App. 5a (quoting *Barrentine*, 450 U.S. at 737). The Ninth Circuit also quoted the statement in *Barrentine* that the FLSA

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[5] The Ninth Circuit also cited its own decision in *Local 246 Utility Workers Union v. Southern California Edison Co.*, 83 F.3d 292 (9th Cir. 1996), which had also read *Barrentine* as precluding a requirement that contractual remedies be exhausted prior to bringing an FLSA claim in court.

> grants individual employees broad access to the courts . . . permit[ting] an aggrieved employee to bring his statutory wage and hour claim "in any Federal or State court of competent jurisdiction." No exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute.

App. 5a (quoting *Barrentine*, 450 U.S. at 740). The court reasoned that, just as the existence of a parallel contractual claim had been held in *Barrentine* not to preclude the bringing of an FLSA action in federal court, so too was it "irrelevant [here] whether the employees' claims may present an arbitrable dispute; they have an independent statutory right under the FLSA that they are entitled to pursue in court." App. 6a.

By failing to note two critical differences between the factual underpinnings of *Alexander* and *Barrentine* and of this case, the Ninth Circuit read the Court's holdings more broadly than the actual reasoning of either case will support. First, neither *Alexander* nor *Barrentine* involved an agreement by a union on behalf of its members to submit statutory claims to arbitration. In *Alexander*, the issue before the Court was what preclusive effect an adverse arbitral ruling on a pure contract claim should have in a subsequent judicial proceeding raising a statutory claim of employment discrimination. Noting that the two claims had "legally independent origins and are equally available to the aggrieved employee," 415 U.S. at 52, and that the arbitrator had been "confined to interpretation and application of the collective bargaining agreement," *id.* at 53 (citation omitted), the Court held that the arbitration decision did not preclude the subsequent Title VII lawsuit. Similarly, *Barrentine* involved the preclusive effect in a lawsuit under the FLSA of a prior arbitral ruling based on the same facts but arising under a

collective bargaining agreement. Citing *Alexander* and again emphasizing that, because of their contractual origins, the questions presented to the arbitrator were not the same as those at issue in the court action, the Court held that the arbitration did not preclude the subsequent litigation. As the Court subsequently explained in *Gilmer*, the *Alexander* line of cases

> did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.*

Gilmer, 500 U.S. at 35 (emphasis added).

Second, both *Alexander* and *Barrentine* addressed arguments that would have made arbitration an employee's exclusive remedy for a statutory claim, rather than requiring only that an attempt first be made to resolve the claim through arbitration but not depriving the employee of the right to go to court if a satisfactory resolution was not achieved. Although the Ninth Circuit correctly noted that this Court in *Gilmer* and *Livadas* confirmed the distinction between statutory and contractual claims, App. 7a, those cases, like *Alexander* and *Barrentine*, did not involve collectively bargained agreements to arbitrate statutory claims at all, much less requirements only that employees submit such claims to arbitration prior to filing suit, and thus neither provides clear guidance as to the issue in this case. And the express reservation in *Wright* of the issue whether a collectively bargained agreement to arbitrate statutory claims could ever be enforced appears to

reflect a recognition by the Court that its prior decisions did not require the conclusion that the Ninth Circuit reached.

B. The Ninth Circuit's Decision Rests On A Factually Unsupported And Legally Unwarranted Presumption That Statutory Rights Cannot Be Protected Through Arbitration

In its decision, the Ninth Circuit accepted without additional scrutiny the suggestion in *Alexander* and *Barrentine* that arbitration of statutory claims under collective bargaining agreements should be disfavored because of concerns that unions will control the grievance and arbitration process and will sacrifice the interests of individual employees to the collective interests of the majority of its members, in violation of the substantive guarantees provided by the pertinent statute.[6] *See, e.g., Barrentine*, 450 U.S. at 742. To the extent it applies to the non-binding arbitration of FLSA claims, the presumption that union representation will be inadequate to protect employees' statutory rights needs to be revisited for two reasons. First, as the Court in *Barrentine* expressly stated, its analysis was directed at explaining "why an employee's right to a minimum wage and overtime pay under the FLSA might be lost *if submission of his wage claim to arbitration precluded him from later bringing an FLSA suit in federal court.*" 450 U.S. at 742 (emphasis added). Although it is Albertson's position that arbitration can preclude a later court action where the agreement so provides, Albertson's argues here only that at the very least the contractual grievance/arbitration process had to be exhausted before a lawsuit could be brought on these statutory claims.

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[6] The Ninth Circuit found that this concern was also reflected in this Court's decisions in *Gilmer* and *Livadas*. App. 7a. *Gilmer* and *Livadas*, however, merely described the explanations that had appeared in the earlier cases, and did not provide any independent analysis or justification for their conclusions.

The considerations identified in *Alexander* and *Barrentine* and relied on by the Ninth Circuit in this case lose whatever force they might otherwise have if the arbitration is not preclusive. Indeed, *Barrentine* itself discussed the evidentiary weight to be accorded a non-final arbitration decision in a subsequent court proceeding, stating that "[w]e do not hold that an arbitral decision has no evidentiary bearing on a subsequent FLSA action in court," and quoting *Alexander*'s observation that "[w]here an arbitral determination gives full consideration to an employee's [statutory] rights, a court may properly accord it great weight." *Barrentine*, 450 U.S. at 743-44 n.22 (quoting *Alexander*, 415 U.S. at 60 n.21). As *Alexander* explained:

> [T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under [the federal statute]. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

415 U.S. at 59-60 (footnote omitted). *See Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F. Supp. 440, 454 (D. Or. 1997) (exhaustion of arbitration remedy "is a necessary step in order to minimize any friction between the vindication of individual statutory rights and the federal labor policies that favor the collective bargaining process"); *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. 1529, 1539 (N.D. W. Va. 1995) (requiring arbitration of civil rights claim allows civil rights law "to co-exist with, rather than displac[e], the policy encouraging arbitration of employment disputes").

Second, the reasons that the Court gave for questioning the suitability of arbitration for resolving statutory claims are conclusory and warrant reconsideration. The Court identified two reasons why arbitration might prove inadequate. The first was the concern that a union, without breaching its duty of fair representation, might reasonably and in good faith decide not to support the claim vigorously in arbitration. This mere possibility seems too speculative to overcome an otherwise valid requirement that the parties attempt to resolve statutory claims through arbitration. Congress has expressed a strong policy in favor of resolving labor disputes according to the process selected by the employer and its employees acting through their collective bargaining representative. *See, e.g., United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). If the statutory nature of the claim serves to preserve the employees' rights to go to court if the outcome of the arbitration is unsatisfactory, there is no reason not to presume that a collectively bargained agreement to process statutory claims through the negotiated dispute resolution procedure accurately expresses the covered employees' preferred method of addressing such claims, even if that procedure gives the employees' representative some leeway in handling disputes. As discussed below, there are sound, practical reasons that employees rationally might prefer this procedure over litigation.[7]

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[7] It is difficult to identify a valid distinction between the ability of a union to represent employees with statutory claims in arbitration and its ability to represent them in litigation over the same claims. Here, the UFCW is sponsoring and financing class action litigation against Albertson's in four separate lawsuits. Whatever concern exists that individual interests might be sacrificed by the UFCW in arbitration is at least equally present in these union-financed class actions since

Any suggestion that unions will be less than diligent in pursuing statutory claims seems especially dubious. As the district court recognized,

> The specter of unions casting off individuals for some undefined collective good seems too remote to warrant ignoring the general rule favoring arbitration. Recent studies prove that arbitration remains a vitally effective forum to resolve disputes. Evidence shows that "there is a strong probability" that a labor arbitration proceeding "will lead to final resolution of the claim." . . . Thus, there does not appear to be wide-spread dissatisfaction with the union's representation during arbitration.

App. at 37a-38a (citation omitted). Even if union handling of discrimination claims such as those at issue in *Alexander* and *Wright* could validly be viewed as suspect due to the unions' own historical role in such discrimination, *see, e.g., Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), and the inherent potential for conflicts among union members that such claims present, *see, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), there is no similar basis for believing that unions might be tempted to compromise wage and hour claims. Such claims typically present no conflicts among employees, who share a uniform interest in ensuring that employers pay their wages fully and on time. *See Barrentine*, 450 U.S. at 749-51 (Burger, C.J., dissenting) (FLSA claims do not present the same "tension" with other union interests that discrimination claims present); *Satterwhite v. United Parcel*

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resolution of class litigation, through either settlement or adjudication, often involves compromising the claims of individual class members. *See, e.g., Officers For Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982); *Mandujano v. Basic Vegetables Prods.*, 541 F.2d 832, 835 (9th Cir. 1976).

Serv., Inc., 496 F.2d 448, 451 (10th Cir. 1974) (wages and hours "are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights.").

The assumption that the duty of fair representation contains inadequate safeguards to ensure that statutory rights are protected also deserves closer scrutiny than it has received. For example, although unions are permitted some flexibility in representing their members, the ability of a claimant challenging his union's handling of his grievance to obtain a jury trial serves as an effective check on union conduct. App. 38a (citing *Teamsters Local 391 v. Terry*, 494 U.S. 558 (1990)). Unions are not free to ignore meritorious grievances or to process grievances in a perfunctory manner. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). In addition, as the district court noted, "the union's motivation to continue as the bargaining representative is a powerful force preventing shoddy representation." App. 38a.

The second reason identified by the Court in *Barrentine* for questioning the suitability of arbitration concerned the qualifications of the arbitrator and the scope of remedies available for statutory violations. The Court expressed concern that an arbitrator, even if knowledgeable of the law of the shop, "may not be conversant with the public law considerations underlying the FLSA," 450 U.S. at 743, and even if he were, might not have the contractual authority to address statutory claims. *Id.* at 744. The Court also deemed it "most unlikely" that a collective bargaining agreement will authorize an arbitrator to grant claimants the full scope of FLSA relief that would be available in a judicial proceeding. *Id.* at 745.

Neither of these concerns justifies a general presumption against the arbitration of statutory claims. In *Gilmer*, this Court expressly rejected such "generalized

attacks on arbitration" and upheld the suitability of arbitration for discrimination claims against "a host of challenges to the adequacy of arbitration procedures."

> [I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Gilmer, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)); *see Austin*, 78 F.3d at 880; s*ee also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) ("potential complexity [of antitrust claim] should not suffice to ward off arbitration"); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987) ("a general suspicion of the desirability of arbitration and the competence of arbitral tribunals" applies "with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally"). The employer and union are fully capable of selecting arbitrators knowledgeable of substantive rights under the FLSA, and of granting the arbitrator authority to impose the full range of FLSA remedies if that is deemed appropriate. The Ninth Circuit made no determination regarding the scope of remedies available under the collective bargaining agreements at issue in this case, and in any event, retention of the ability to pursue a claim in court *de novo* renders any such determination irrelevant.

C. No Basis Exists For Finding That Congress Intended To Preclude The Arbitration Of FLSA Claims

Because the Ninth Circuit misinterpreted this Court's decisions as precluding the arbitration of statutory claims generally, it made no determination regarding the propriety of arbitrating FLSA claims in particular. In *Gilmer*, the Supreme Court stated that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (quoting *Mitsubishi Corp.*, 473 U.S. at 628). The party opposing arbitration has the burden of showing that Congress intended to preclude the waiver of the right to a judicial resolution of a particular statutory claim. *Gilmer*, 500 U.S. at 26. *Gilmer*, however, like *Barrentine*, was concerned with an agreement that would have made the arbitral decision final and binding on the statutory claim, not with a requirement only that the employee try to resolve the statutory claim first through a contractual procedure with the right to go to court for *de novo* consideration of the claim if the result of that procedure is not satisfactory.

A requirement that an employee exhaust contractual grievance/arbitration procedures prior to filing a lawsuit under the FLSA would not require the waiver of the right to a judicial resolution of the claim. In *Gilmer*, the Court ruled that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Corp.*, 473 U.S. at 628). Even if an exhaustion requirement were to be viewed as a waiver, however, nothing in this Court's decisions would support a finding that Congress intended to preclude enforcement of a collectively bargained agreement

to submit FLSA claims to arbitration prior to pursuing them in a lawsuit.

To be sure, this Court has indicated that FLSA rights must be strictly enforced. For example, in *Barrentine* the Court stated that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." 450 U.S. at 740. This statement drew on the Court's earlier decision in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), in which the Court had considered whether an employee can waive or release his right under the FLSA to liquidated damages and other remedies specified in the statute. In *Brooklyn Savings Bank*, the Court explained that whether a private right created by a federal statute such as the FLSA can be waived "depends upon the intention of Congress as manifested in the particular statute." *Id.* at 704-705. The Court found that "[n]either the statutory language, the legislative reports nor the debates indicates that the question at issue was specifically considered and resolved by Congress," but determined that "a broader consideration of legislative policy" showed that "Congress did not intend that an employee should be allowed to waive his right to liquidated damages." *Id.* at 705-706 (footnotes omitted); *see also D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946) ("neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage" (footnote omitted)).[8]

Although arguably restricting the ability of the parties to collective bargaining agreements to limit the scope of

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[8] In the Portal-to-Portal Act of 1947, Congress provided that employees whose claims arose prior to the date of enactment could waive their right to liquidated damages, and gave courts discretion to limit the amount of liquidated damages upon a showing by the employer that its actions had been in good faith. 29 U.S.C. §§ 253, 260.

remedial relief available in final and binding arbitration,[9] these decisions fall short of evincing a congressional intent to preclude arbitration altogether. As noted above, in *Gilmer*, the Court squarely held that an individual agreement to arbitrate a statutory claim of discrimination does not constitute a waiver of substantive rights, but rather only submits their resolution to an alternative forum. *Gilmer*, 500 U.S. at 26. Accordingly, both prior to and after *Gilmer*, courts have routinely enforced individual agreements to arbitrate statutory claims, including claims arising under the FLSA. *See, e.g.*, *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997) (FLSA claim); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996) (FLSA claim); *Bright v. Norship Co.*, 951 F. Supp. 95 (E.D. Va. 1997), *aff'd*, 133 F.3d 913 (4th Cir. 1998) (ADA claim); *Brummett v. Copaz Packing Corp.*, 954 F. Supp. 160 (S.D. Ohio 1996) (Title VII, ADEA, and ADA claims); *Jessie v. Carter Health Care Ctr., Inc.*, 930 F. Supp. 1174, 1176-77 (E.D. Ky. 1996) (Title VII claim); *Henry v. Colonial Baking Co.*, 952 F. Supp. 744, 753 & n.14 (M.D. Ala. 1996) (Title VII claim); *Tomasetti v. Prudential Ins. Co.*, 153 L.R.R.M. (BNA) 2468, 2471 (E.D. Cal. 1996) (state discrimination claim); *Hampton v. ITT Corp.*, 829 F. Supp. 202, 204 (S.D. Tex. 1993) (finding no showing that Congress intended to preclude arbitration as to FLSA claims and no showing of inconsistency or conflict between arbitration and FLSA's underlying purposes).

Indeed, the United States Secretary of Labor has indicated that she is considering the possibility of offering alternative dispute resolution procedures for certain claims, including claims arising under the FLSA. On February 6,

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[9] Preservation of the employee's right to pursue his claim in court *de novo* notwithstanding the outcome of the arbitration proceeding would ensure the availability of the full range of statutory remedies even if the arbitrator's range of remedies was limited.

1997, the Secretary issued notice of a proposed pilot test program to explore the use of alternative procedures for resolving a variety of statutory claims, and invited comments on whether arbitration should be offered as an option for disputes concerning FLSA claims. *See* Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor, 62 Fed. Reg. 6690 (published Feb. 12, 1997). This proposal by the Secretary suggests that the Department of Labor does not understand the FLSA to preclude the submission of wage and hour claims to an arbitral forum for resolution.

D. The Ninth Circuit's Decision Deprives Both Employers And Employees Of The Benefits Of Collectively Bargained Alternatives To Litigation For The Resolution Of Statutory Claims

The Ninth Circuit's decision is fundamentally inconsistent with significant congressional and judicial policies favoring the resolution of employment disputes through arbitration rather than litigation. As this Court has repeatedly explained, enforcement of agreements to arbitrate employment disputes serves to promote workplace harmony and industrial peace. *See, e.g., Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). For example, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court stated:

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the [Labor Management Relations Act] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against

> labor organizations and that industrial peace can be best obtained only in that way.

353 U.S. at 455. The delays associated with litigation also permit workplace disputes to fester and expand to an unnecessary and disruptive degree. As the district court in this case noted, the rationale of the cases finding union representation inadequate for statutory claims creates a "gaping hole in the general rule favoring arbitration" and upsets four decades of federal common law favoring arbitration of labor disputes. App. 37a.

Voluntary agreements to arbitrate are favored because they allow the parties to resolve workplace disputes with a minimum of delay, expense, and rancor. In contrast, litigation typically is long and drawn out as well as costly, resulting in dissatisfaction and unnecessary expense to all parties. As one district court recently commented in enforcing an arbitration agreement:

> [A]ccess to the courts now is neither affordable nor expeditious. In many federal district courts and state courts, years pass before an aggrieved party can even have the proverbial day in court. In the meantime, the process grinds along, inflicting staggering legal expenses on the parties . . . . [W]e have simply priced the court system beyond the reach of most citizens, because the cost of litigation far exceeds the value of the decision itself. . . . In short, our current legal system for resolving disputes is losing the respect of the public and is rapidly approaching failure.
>
> The consequent embracing of alternative methods of dispute resolution should surprise no one. The arbitral process, for instance, nearly always exceeds the judicial process in speed, efficiency, and inexpense. . . . Arbitration and other alternative

> methods of dispute resolution provide for ordinary citizens and businesses what our court system no longer produces with any regularity: Affordable, speedy justice.

Bright, 951 F. Supp at 98.

Although much of this Court's jurisprudence on the advantages of arbitration focuses on contract disputes rather than statutory claims, the same considerations apply to both, and as long as statutory rights are protected, the same advantages exist for both. In proposing a pilot program to test the use of arbitration and mediation to resolve a variety of statutory claims, the Secretary of Labor appears to have recognized that arbitration offers advantages that can outweigh the statutory provision for a judicial forum. *See* 62 Fed. Reg. at 6691. Wage and hour disputes are particularly suitable for arbitration because the statutory issues are typically intertwined with issues requiring the interpretation and application of collective bargaining agreement provisions. *See Barrentine*, 450 U.S. at 750-51 (Burger, C.J., dissenting); *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944) (FLSA "does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible."). In *Leahy v. City of Chicago*, 96 F.3d 228, 232 (7th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1818 (1997), for example, the Seventh Circuit ruled that a collective bargaining agreement provision providing for the payment of overtime to police officers who worked more that eight hours in a day protected the officers' FLSA right to compensation for time worked in excess of eight hours, noting that the "individual inquiry facilitated by the grievance process is the most efficient way" to resolve the statutory claim. *Cf. Satterwhite v. United Parcel Serv., Inc.*, 496 F.2d at 451 ("Wages and hours are at the heart of the collective-

bargaining process . . . and are more suitable to the arbitral process than Title VII rights.").

Enforcing agreements to arbitrate statutory claims also is necessary to give full effect to the presumably deliberate and intentional decision of the represented employees (who are, after all, the very individuals whose rights the statute purports to protect) to bargain for the advantages that this alternative forum provides. Employees can rationally conclude that the benefits of the grievance/arbitration procedure in reducing delay and expense outweighs the (probably small) risk that the union, for institutional reasons, might compromise the claim short of a successful conclusion. *Cf. Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. at 1538-39 (arbitration of civil rights claim permits employee to obtain remedy that might not be available from court, and opportunity to later pursue claim in court assures that union cannot improperly negotiate away employee's statutory rights). The only downside is a short delay in beginning what is likely to be a lengthy litigation process. Part of the quid pro quo for obtaining the very real and otherwise unavailable benefits of arbitration is the concomitant obligation on the part of the employees and their union to submit such claims to the grievance/arbitration process before going to court, in order that the employer too can attempt to forestall the cost and delay of litigation. This obligation imposes only a minimal procedural cost on the employees, and poses no risk to their legitimate statutory interests.

II. The Ninth Circuit's Decision Conflicts With A Decision From The Fourth Circuit Regarding The Arbitrability Of Statutory Claims

The Ninth Circuit's decision is inconsistent with the rationale underlying the decision of the Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, ___ U.S.

___, 117 S. Ct. 432 (1996). Applying *Gilmer* and interpreting Section 118 of the Civil Rights Act of 1991, the Fourth Circuit held in *Austin* that a collectively bargained agreement to submit "all disputes" to the contractual grievance/arbitration procedure precluded a discharged employee from bringing suit against her employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Americans With Disabilities Act, 42 U.S.C. § 12101. The court determined that a provision of the 1991 amendments to Title VII and a similar provision under the ADA encouraging alternative means of dispute resolution, including arbitration, demonstrated a congressional intent favoring arbitration of claims arising under those statutes. 78 F.3d at 881. Noting that every case decided in the courts of appeals under the 1991 amendments had enforced individual agreements to arbitrate such claims, 78 F.3d at 882, the court refused to find that a collectively bargained agreement warranted a different result.

> The collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration. This voluntary agreement is consistent with the text of Title VII and the Disabilities Act, the legislative intent behind those statutes, and the purposes of those statutes. Finding that Congress did not intend to preclude arbitration of claims under Title VII and the Disabilities Act, we hold that the arbitration provision in this collective bargaining agreement is enforceable.

78 F.3d at 885-86.

Although *Austin* involved statutory claims arising under Title VII and the ADA rather than the FLSA, the rationale underlying the Fourth Circuit's decision is fundamentally inconsistent with that adopted by the Ninth

Circuit in this case.[10] The Ninth Circuit apparently assumed, as did the district court, that the collective bargaining agreements at issue here covered FLSA claims, and there is nothing in the FLSA itself, its legislative history or its purposes to suggest that Congress intended to exclude arbitration. In these circumstances, the rationale relied on by the Fourth Circuit would require enforcement of the collectively bargained agreement to arbitrate.

Although every other court of appeals to consider the issue has, like the Ninth Circuit, declined to follow the Fourth Circuit's decision in *Austin*, all have relied on the same sort of questionable assumptions regarding the adequacy of union representation that are discussed above. *See Johnson v. Bodine Elec. Co.*, 142 F.3d 363 (7th Cir. 1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *vacated on other grounds*, ___ U.S. ___, 118 S. Ct. 2364 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 295 (1997); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 946 (1997).

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[10] In a footnote, the Fourth Circuit purported to distinguish its decision from the result in a Second Circuit case involving an FLSA claim, *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), on the grounds that the FLSA does not contain any provision comparable to Section 118 of the 1991 Civil Rights Act or its counterpart under the ADA, and on the grounds that *Barrentine* had determined that FLSA claims were not appropriate for arbitration. *Austin*, 78 F.3d at 882-83 n.2. That the FLSA does not contain an express provision for arbitration does not alter the fact that nothing in that statute evinces an intent to preclude the use of such a forum, and as previously discussed, *Barrentine* holds only that arbitration of a contract claim cannot preclude subsequent litigation of a related FLSA claim. The court also noted that the plaintiff in *Austin* was a party to an individual agreement to arbitrate in addition to the general contract provision. The court, however, expressed its holding as being that the "collective bargaining agreement is enforceable." 78 F.3d at 886. Thus, the Fourth Circuit's dicta regarding the applicability of its decision in FLSA cases does not eliminate the conflict between its actual holding and the Ninth Circuit's ruling in this case.

None of these cases provides compelling reasons for finding that employees and unions should not be required to exhaust collectively bargained dispute resolution procedures prior to filing an FLSA action in court.

For example, the courts in *Brisentine*, *Harrison*, and *Varner* did not find that the parties agreed to arbitrate statutory claims. *See Brisentine*, 117 F.3d at 524 (finding that parties had not agreed to arbitrate statutory claims); *Varner*, 94 F.3d at 1213 (no consideration by court of whether parties agreed to arbitrate statutory claims); *Harrison*, 112 F.3d at 1454 n.2 (finding no indication in the record that parties had agreed to arbitrate statutory claims). In *Pryner*, the Seventh Circuit conceded that one of the agreements at issue might have covered statutory claims but paid no attention to the distinction in its analysis. 109 F.3d at 364. In addition, both *Brisentine* and *Pryner* recognize that, in certain circumstances, agreements to arbitrate statutory claims would be enforceable even in the collective bargaining context. In *Johnson*, the Seventh Circuit followed *Pryner* in holding that an employee need not submit his statutory claim to final and binding arbitration. 142 F.3d at 366-67.

CONCLUSION

For the foregoing reasons, Albertson's, Inc. respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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February 3, 1999

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERTSON'S, INC.,

Plaintiff- Appellant,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO & CLC; UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 44; UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 368A; INTERNATIONAL UNION, AFL-CIO & CLC; CWCW LOCAL 81; CWCW LOCAL 367; CWCW LOCAL 381; CWCW LOCAL 555; CWCW LOCAL 1105; CWCW LOCAL 1439; CWCW LOCAL 135; CWCW LOCAL 324; CWCW LOCAL 373; CWCW LOCAL 588; CWCW LOCAL 770; CWCW LOCAL 839; CWCW LOCAL 870; CWCW LOCAL 1036; CWCW LOCAL 1167; CWCW LOCAL 1179; CWCW LOCAL 1288; CWCW LOCAL 1428; CWCW LOCAL 1442,

Defendants-Appellees.

No. 97-35500
D.C. No.
CV-96-00398-BLW

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted
August 5, 1998—Seattle, Washington

Filed October 8, 1998

Before: Dorothy W. Nelson and Alex Kozinski, Circuit Judges, and William W Schwarzer,* Senior District Judge.

OPINION

SCHWARZER, Senior District Judge:

We must decide whether members of a labor union may assert claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, in federal court without resort to the grievance-arbitration procedure under the collective bargaining agreement between their union and their employer. The district court held that the employees are not required to submit their claims to arbitration before bringing suit under the FLSA. We affirm although on somewhat different reasoning.

FACTS AND PROCEDURAL HISTORY

Albertson's is a retail grocery chain with 800 stores in 19 states, employing about 85,000 people. Collective Bargaining Agreements (CBAs) cover about 28,000 employees who are members of various local unions (Locals) of the United Food & Commercial Workers International Union (UFCW). The Locals and the UFCW complain that

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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Albertson's forces employees to work without punching the time clock and without getting paid—work that is described as "off-the-clock." Allegedly, an employee who records the full amount of time spent to complete an assignment risks discipline or discharge.

The UFCW threatened to sue to collect for off-the-clock work. Albertson's responded by filing this action against twenty Locals and the UFCW (together, the Unions). Its complaint contained four counts, but only Count One is before us on appeal. That Count, brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, sought a declaratory judgment that the Unions will breach the CBAs by failing to submit their off-the-clock claims to arbitration.[1] Shortly after the filing of this action, the Unions—along with others—filed actions against Albertson's in California, Washington, and Florida alleging claims under the FLSA as well as under state wage and hour statutes. The state court actions were removed and all actions have since been consolidated in the District of Idaho.

Albertson's moved for partial summary judgment on Count One declaring that the Unions must arbitrate their FLSA claims. The Unions moved to dismiss the complaint for, among other grounds, lack of subject matter jurisdiction and failure to state a claim. The district court denied Albertson's motion for partial summary judgment and granted the Unions' motion to dismiss with respect to Count One. The court then determined that "Count One predominates in terms of its importance to this litigation," found that under Federal

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[1] Count Two, also brought under § 301, alleges wrongful interference by the UFCW with the CBAs between Albertons's and the Locals. Count Three, brought under § 301, alleges that the UFCW persuaded the Locals to withhold employee complaints and to advise employees not to seek arbitration of their off–the-clock work complaints. Count Four alleges a state law claim for intentional interference with contract.

Rule of Civil Procedure 54(b) there was no just reason for delay, and directed entry of final judgment. Albertson's appealed from the judgment.

The district court had subject matter jurisdiction pursuant to 29 U.S.C. § 185(a) and 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291, and we affirm.

DISCUSSION

The district court, feeling itself bound by the presumption in favor of arbitrability where the CBA contains a broad arbitration clause and finding no limiting provisions, proceeded on the assumption that the wage and hour claims asserted by the Unions were covered by the arbitration clauses. It then acknowledged that an inherent conflict exists between arbitration under the CBAs and the underlying purpose of the FLSA and concluded that public policy resolves that conflict in favor of permitting FLSA claims to be litigated without resort to arbitration. We agree with the result reached by the district court, but on somewhat different reasoning.[2]

The Supreme Court's decision in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), makes clear that the rights of employees arising out of the collective bargaining agreement are separate and distinct from those arising out of a statute such as the FLSA:

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[2] We review the summary judgment de novo and may affirm on any ground supported by the record. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (reviewing grant of summary judgment de novo); *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996) (reviewing dismissal for failure to state a claim de novo); *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1026 (9th Cir. 1996) ("We may affirm the district court's judgment on any ground supported by the record.")

> While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

Id. at 737. The Court cited its prior decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), in which it had held that "in enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining." *Barrentine*, 450 U.S. at 737-38. The Court rejected the contention that because FLSA claims are based on disputes over wages and hours and thus "at the heart of the collective-bargaining process," they are "particularly well suited to resolution through collectively bargained grievance and arbitration procedures." *Id.* at 738. It reasoned:

> The statutory enforcement scheme grants individual employees broad access to the courts . . . permit[ting] an aggrieved employee to bring his statutory wage and hour claim "in any Federal or State court of competent jurisdiction." No exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute.

Id. at 740. And it explained:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under [the statute], an

> employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Id. at 745-46 (alteration in original) (quoting *Gardner-Denver*, 415 U.S. at 49-50 (internal quotation marks omitted)). That the grievance may have presented a claim under the CBA in addition to one under the FLSA, the Court observed, was thus irrelevant for even if it did, the employees would not be precluded from bringing their action in federal court. *See id.* at 731 n.4. So here, it is irrelevant whether the employees' claims may present an arbitrable dispute; they have an independent statutory right under the FLSA that they are entitled to pursue in court.

We followed *Barrentine* in *Local 246 Utility Workers Union v. Southern California Edison Co.*, 83 F.3d 292 (9th Cir. 1996), holding that the FLSA's "minimum wage and overtime provisions . . . are guarantees to individual workers that may not be waived through collective bargaining." *Id.* at 297. Distinguishing the situation where the employees' claim was based on contract rather than on the FLSA, we said that where the claim is based on substantive rights under the FLSA, no resort to arbitration under the CBA is required. *See id.*

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court confirmed the continuing vitality of the *Barrentine/Gardner-Denver* line of cases. Referring to *Gardner-Denver*, the *Gilmer* court stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII

rights." *Id.* at 34. The *Gilmer* court distinguished the *Gardner-Denver* line of cases from the case before it, which involved an individual's employment agreement providing for arbitration of any "controversy between [the parties] . . . arising out of the employment or termination," *id.* at 23, by stating:

> [T]hose cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, . . . the arbitration in those cases understandably was held not to preclude subsequent statutory actions.

Id. at 35. In *Livadas v. Bradshaw*, 512 U.S. 107 (1994), the Court elaborated on this distinction, saying:

> *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.* . . . *Gilmer* distinguished *Gardner-Denver* as relying, *inter alia*, on: the "distinctly separate nature of . . . contractual and statutory rights" (even when both were "violated as a result of the same factual occurrence"), the fact that a labor "arbitrator has authority to resolve only questions of contractual rights," and the concern that in collective bargaining arbitration, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."

Id. at 127 n.21 (citations omitted).

Since the decision in *Gilmer*, other circuits, with only one exception, have held that an employee has the right to sue under the FLSA, as well as other statutes, without having to resort to the collectively bargained grievance-arbitration

procedures. *See Penny v. United Parcel Service*, 128 F.3d 408, 413-14 (6th Cir. 1997) (Americans with Disabilities Act (ADA)); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-54 (10th Cir. 1997) (Title VII), *vacated on other grounds*, 118 S. Ct. 2364 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997) (ADA); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 364-65 (7th Cir.) (Title VII, ADA and Age Discrimination in Employment Act (ADEA)), *cert. denied*, 118 S. Ct. 294, 295 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (Title VII); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995) (FLSA); *see also Fujikawa v. Gushiken*, 823 F.2d 1341, 1345 (9th Cir. 1987) (ERISA); *Zipf v. ATT*, 799 F.2d 889, 893 n.5 (3d Cir. 1986) (ERISA). *But see Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 885, 877 (4th Cir. 1996) (mandating arbitration of employee's Title VII and ADA claims).

Albertson's reliance on our decision in *Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996), is misplaced. *Kuehner*, like *Gilmer*, involved the enforceability of an arbitration clause in an individual employee's employment agreement providing for arbitration of "any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the [NASD]." *Id.* at 318 (alteration in original). In affirming the district court's order staying the action of Kuehner's FLSA claim pending arbitration, we concluded that Congress had not restricted the enforceability of contracts to arbitrate FLSA claims. We followed *Gilmer* in holding that under the FAA the employee's individual agreement to arbitrate all disputes was enforceable with respect to disputes over claims covered by the FLSA. *See id.* at 320. As *Gilmer* makes clear, that decision does not bear on the right of employees covered by a collective bargaining agreement to litigate their FLSA claims.

In sum, we hold that employees covered by a collective bargaining agreement are entitled to take their FLSA claims to court regardless of whether those claims may also be covered by the grievance-arbitration procedure.

The judgment is AFFIRMED.

[Filed Nov. 6, 1998]

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERTSON'S, INC.,
Plaintiff-Appellant,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO & CLC; UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 44; UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 368A; INTERNATIONAL UNION, AFL-CIO & CLC; CWCW LOCAL 81; CWCW LOCAL 367; CWCW LOCAL 381; CWCW LOCAL 555; CWCW LOCAL 1105; CWCW LOCAL 1439; CWCW LOCAL 135; CWCW LOCAL 324; CWCW LOCAL 373; CWCW LOCAL 588; CWCW LOCAL 770; CWCW LOCAL 839; CWCW LOCAL 870; CWCW LOCAL 1036; CWCW LOCAL 1167; CWCW LOCAL 1179; CWCW LOCAL 1288; CWCW LOCAL 1428; CWCW LOCAL 1442,

Defendants-Appellees.

No. 97-35500
D.C. No. CV-96-00398-BLW

ORDER

Before: D.W. NELSON and KOZINSKI, Circuit Judges, and SCHWARZER,* District Judge.

The petition for rehearing is DENIED.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ALBERTSON'S, INC.,
Plaintiff,

v.

UNITED FOOD & COMMERCIAL
WORKERS, et al.,
Defendants.

CIV. No. 96-0398-S-BLW

MEMORANDUM DECISION

INTRODUCTION

The Court has pending before it five motions. The Court heard oral argument on January 27, 1997, and the motions are now at issue. The Court denied from the bench the Defendants' motion to vacate hearing, and took under advisement the remaining motions. The Court now finds that (1) it has personal jurisdiction over the Defendants; (2) it has subject matter jurisdiction over the dispute; and (3) the Defendants are not required to arbitrate their wage claims. The Court will discuss the individual motions after reviewing the litigation background.

LITIGATION BACKGROUND

Plaintiff Albertson's is a retail grocery chain with 800 stores in 19 states, employing about 85,000 people.

Collective bargaining agreements (CBAs) cover about 28,000 employees who are members of various local unions ("Locals") of the United Food & Commercial Workers International Union ("International"). The relationship between the Locals and International was not described in any detail by the parties. It appears that the Locals are chartered by the International. The CBAs are signed by representatives from the Locals, not the International. Albertson's claims in its complaint that the International acts as the agent of the Locals, a claim denied by the Locals and the International.

The Locals and the International have complained for years that Albertson's forces employees to work without punching the time clock, and without getting paid — work that is described as "off-the-clock." The International conducted surveys of Albertson's employees, and now claims that "some 2,000 current and former Albertson's employees have reported they worked off the clock . . . ." *See, Defendants' Brief at 5.* Albertson's denies these claims, and responds that the International is engaged in "a campaign of harassment designed to pressure Albertson's into recognizing the [union] as the bargaining agent of that portion of Albertson's work force that has chosen to remain non-union." *See, Albertson's Brief* at 2.

In August of 1996, the International threatened to sue Albertson's over the off-the-clock work. Albertson's responded by filing this lawsuit against twenty Locals and the International. Albertson's complaint contains four counts. Count One is brought under § 301[1] of the Labor Management

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[1] Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a). It seeks a declaratory judgment that the Locals and the International will breach the CBAs by failing to submit their off-the-clock claims to arbitration. Count Two, brought under § 301, alleges that the International wrongfully interfered with the CBAs between Albertson's and the Locals. Count Three, brought under § 301, claims that the International has persuaded the Locals to withhold from Albertson's employee complaints about off-the-clock, and to advise workers not to seek arbitration of their complaints. This conduct, Count Three asserts, on the part of both the Locals and the International, violates provisions of the CBAs requiring the Locals to share information on off-the-clock work and requiring arbitration of those disputes.

Count Four is the only claim not brought under §301. It asserts that International's conduct in advising Locals to withhold any off-the-clock information from Albertson's and to refuse to go to arbitration constitutes an intentional interference with contract. Although the Count does not specify which law is applicable, the briefing and argument made it clear that Count Four is based entirely on Idaho law.

Shortly after Albertson's filed its complaint here, the Locals and the International —along with others — filed suit against Albertson's in California, Washington, and Florida. The suit in California was filed in federal district court and alleges claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and state wage and hour statutes. The Washington action was filed in state court and contains claims that Albertson's violated state wage and hour statutes. The Florida action was also filed in federal district court, and contains claims under FLSA and state wage and hour statutes.

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having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In these actions, the unions claim that Albertson's fosters a work-place atmosphere that encourages off-the-clock work. The suits assert that management gives work assignments knowing that the jobs cannot be completed within the employees' scheduled hours; that bonuses are paid to those who get a job done in "less" than the scheduled time; and that discipline, demotion, and/or discharge are often the result when an employee records his or her work time in excess of the scheduled hours needed to finish the work.

Albertson's denies these charges, and points to prohibitions in the CBA against off-the-clock work such as the following example:

> The employer shall be responsible for payment for all hours worked, and an employee shall only work those hours specifically authorized by the Employer. Accordingly, it is intended that there shall be no "free or time off-the-clock" work practices under this Agreement. Any employee found by the Employer or the Union to be engaging in such practice shall be subject to discipline, which may include termination.

Albertson's alleges that it has abided by this provision in the CBAs. In addition, Albertson's asserts that the Locals have violated a provision in the CBAs requiring cooperation between the Locals and Albertson's in preventing off-the-clock work:

> The Union shall promptly report in writing to the Employer any observed violation by an employee of this reporting time provision or the working of unauthorized time, and the Employer will take the necessary steps with the employee to correct such violation.

Finally, Albertson's also asserts that by filing the court actions around the country, the Locals have breached the CBA provisions requiring arbitration of any disputes.

Albertson's points to language in the CBAs requiring arbitration

> for the purpose of passing on all claims, disputes and grievances arising between the parties during the term of this Agreement over the construction and application of this Agreement, *or relating to working conditions arising out of this Agreement,* when such cannot be settled directly between the Union and the particular Employer involved. (emphasis added).

PERSONAL JURISDICTION AND VENUE

Although the International has not contested personal jurisdiction, most of the Locals have filed motions to dismiss for lack of personal jurisdiction. Albertson's bears the burden of proving that this Court has personal jurisdiction over the Defendants. *Rano v. Sipa Press, Inc.*, 987 F.2d 580 (9th Cir. 1995).

The assertion of personal jurisdiction must comply with the requirements of Idaho's long-arm statute (I.C. §5-514(a)) and must not offend due process. *Decker Coal Company v. Commonwealth Edison Company*, 805 F.2d 834 (9th Cir. 1986). Because the Idaho long-arm statute exercises all jurisdiction consistent with due process, the test becomes simply whether personal jurisdiction over the defendants comports with due process. *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987) (interpreting the Idaho long-arm statute).

The Locals could subject themselves to jurisdiction in this Court either by their general systematic contacts with Idaho, or by their conduct specifically related to Albertson's claims. *Id.* Albertson's does not assert that the Locals have sufficient continuous and systematic contacts with Idaho to satisfy the general jurisdiction test. Rather, Albertson's claims that the three-part test for specific jurisdiction is met: (1) The defendant must have done some act by which he

purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Terracom v. Valley Nat. Bank*, 49 F.3d 555 (9th Cir. 1995). "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendants of due process of law." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995).

The first requirement of purposeful availment is established where the defendants have entered into contracts with Plaintiff, a forum resident, and "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing [establish that] the defendant[s] purposefully established minimum contacts within the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Here, it is undisputed that all of the Locals entered into CBAs with Albertson's, whose principal place of business is in Idaho. There is also no dispute that the CBAs contain grievance-arbitration provisions that are to be administered by Albertson's contract administrators in Idaho. The record contains unrebutted evidence that Locals contact Albertson's Idaho office on a regular basis to discuss grievance-arbitration matters. These were the same type of factors that led the Supreme Court in *Burger King* to find that the defendants in that case had purposefully directed their actions at the forum state. The Court therefore finds that Albertson's has established the first requirement for specific jurisdiction.

Albertson's has also established the second requirement that its claims arise out the Locals' forum-related activities. Albertson's brought this suit to enforce provisions of the CBAs. Those claims grow directly out of the Locals'

forum-related conduct of entering into CBAs contemplating continuing contacts with Albertson's in Idaho.

Once the first two requirements are satisfied, a presumption arises that the forum's exercise of jurisdiction is reasonable. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). To rebut that presumption, the burden shifts to the defendant to make a "compelling" case that the exercise of jurisdiction would be unreasonable. *Id.* The Ninth Circuit has directed this Court to examine seven factors to determine reasonableness:

> (1) The extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudication the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the Plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

The Locals have not carried their "heavy burden" of making a "compelling" case that jurisdiction is unreasonable when these seven factors are examined. *Ballard*, 65 F.3d at 854. The extent of the Locals' purposeful interjection into Idaho's affairs is substantial given the regular contact the Locals must have with Albertson's in Idaho concerning grievance-arbitration matters. Where the burdens of defending a suit are equal, as they appear to be here, the second factor will tip in favor of the Locals. *Terracom*, 49 F.3d at 561. There is no conflict with California's or Washington's sovereignty, and thus the third factor tips in Albertson's favor. Idaho would have some interest in a lawsuit brought by an Idaho-based company seeking to apply

Idaho law. Thus the fourth factor tips in Albertson's favor. The fifth and sixth factors likewise tip toward Albertson's. The seventh factor tips in the Locals' favor since California or Washington could be alternative forums. When examining the seven factors as a whole, the Court finds that the Locals have not overcome the presumption of reasonableness.

The Locals seek additional discovery to show how "each of the defendants transacts business in Idaho and that the Idaho action arises out of the defendants' actions within the State of Idaho." *See, Locals' Brief in Support of Motion to Vacate Hearing at 20.* The Court has the discretion to permit additional discovery before deciding the personal jurisdiction issue. *Data Disc, Inc., v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977). But the Locals have not demonstrated how further discovery would contradict the established facts that they entered into CBAs with Albertson's, a company headquartered in Idaho; that the CBAs contemplated a regular course of dealing between the Locals and the Idaho offices of Albertson's; and that the Locals did in fact have regular contact with Albertson's Idaho offices on grievance-arbitration matters.

Under these circumstances, the Court can find no reason to delay resolution of the motions pending further discovery. *See, Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535 (9th Cir. 1986) (general statements about need to conduct further discovery on personal jurisdiction issues not sufficient). This is especially true here where the Court has not held an evidentiary hearing on the personal jurisdiction issue, and Albertson's need only show a *prima facie* case of personal jurisdiction. *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586 (9th Cir. 1996). The Court's finding here that Albertson's has made out its *prima facie* case does not end the debate. The issue remains alive for trial, where Albertson's must prove personal jurisdiction by a

preponderance of the evidence. *Rano*, 987 F.2d at 587 n.3. Because Albertson's has made out a *prima facie* case of personal jurisdiction, the Court will proceed with the pending motions, but the Locals are free to do discovery on the issue, and Albertson's retains the burden of proving jurisdiction at trial. In that light, the Court will deny the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction.

In that same Motion, the Locals also seek a change of venue. The Locals cite §301(c) of the Labor Management Relations Act, 29 U.S.C. §185(c), that provides that district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains it principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." Despite its terms, §301(c) deals with venue, not jurisdiction. *See, Denver & R. G. W.R. Co. v. Brotherhood of R. Train.*, 387 U.S. 556, 562 (1967) (describing §301(c) as a venue statute); *Reed v. International Union of UAW*, 945 F.2d 198, 201 n.3 (7th Cir. 1991) (listing cases from the Third, Fourth, and Tenth Circuits finding that §301(c) is a venue statute only).

The Locals are engaged in an ongoing relationship with Albertson's in Idaho. That is enough for this venue statute. There are other questions about simplifying this litigation that the Court will address in the next section. It is clear, however, that venue is proper in this Court. The Court will therefore deny the Motion to Change Venue at this time without prejudice to the right of Defendants to raise the Motion at another time.

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO EXHAUST

The Defendants seek dismissal for Albertson's failure to exhaust arbitration as required by the CBAs. Defendants

cite Ninth Circuit law holding that when a CBA contains a broad mandatory arbitration clause, an arbitrator — not the Court — must decide in the first instance whether a dispute is arbitrable. *United Broth. Of Carpenters #1780 v. Desert Palace*, 94 F.3d 1308 (9th Cir. 1996). Defendants assert that Albertson's claims must be dismissed because Albertson's has failed to abide by the mandatory arbitration clauses in the CBAs or, at the very least, that Albertson's claims must be referred to arbitration to let an arbitrator rule on the arbitrability of the claims.

Generally, Courts determine arbitrability. *AT&T Technologies, Inc., v. Communications Workers of America*, 475 U.S. 643 (1986). But where "the parties clearly and unmistakably provide otherwise," the courts will be divested of their authority and an arbitrator will decide in the first instance whether a dispute is arbitrable." *Desert Palace*, 94 F.3d at 1310. The Ninth Circuit has "construed broad arbitration clauses as granting an arbitrator authority to decide his or her own jurisdiction." *Id.*

The clause in *Desert Palace* provided that "all disputes regarding the interpretation or application of the provisions of this Agreement raised by the Union or the employee alleging a violation of the terms and provisions of the Agreement" must be submitted to arbitration. *Id.* at 1310. The Circuit found this clause to contain the type of broad language that required an arbitrator to decide arbitrability. The Circuit concluded that "the district court was correct in requiring the arbitrator, in the first instance, to decide the question of arbitrability." *Id.*

The arbitration clauses in the present case are almost identical to the clause in *Desert Palace*. In addition, some of the CBAs include even more express provisions: "If a question of the arbitrability of an issue is raised by either party, such question shall be determined in the first instance

by the arbitrator." *See, Declaration of Bush, exhibit 29 at 50, ¶ D.1.*

With regard to the CBAs that do not include these express provisions, the issue is whether *Desert Palace* governs and requires an arbitrator to determine arbitrability. With regard to those CBAs that do include the express provisions, the issue is whether Albertson's claims should be referred to arbitration since the Defendants have raised a question about arbitrability. The Court concludes that under either scenario, the Court must make threshold legal determinations that cannot be decided by an arbitrator. To illustrate, the Court will examine each Count of Albertson's complaint.

Count One seeks to compel arbitration of the FLSA and state wage claims under the CBA. Defendants respond that public policy precludes arbitration. More specifically, the Defendants claim that labor arbitration could sacrifice individual statutory rights for the collective good of all workers in the bargaining unit.

The Supreme Court has held that an arbitrator "does not have the 'general authority to invoke public laws that conflict with the bargain between the parties.'" *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 34 (1991) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)). In other words, the question whether public policy precludes mandatory arbitration "is a question for the courts alone to decide." *Northrop Corp. v. Triad Intern. Marketing S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1988), *amended on other grounds*, 842 F.2d 1154 (9th Cir. 1988).

In *Desert Palace*, there was no claim that arbitration would violate public policy. That case involved a straightforward issue of CBA interpretation. Thus, with regard to Count One, *Desert Palace* is distinguishable. The

analysis is no different for those cases that have express provisions that arbitrators decide arbitrability. Once again, the arbitrator lacks the authority to determine if arbitration would violate the public policy behind the FLSA and state wage claims.

Instead, the Court is guided by the holdings in *Gilmer* and *Northrop* that the public policy question is for the Court to decide. That public policy issue is so intertwined with Count One as to be inseparable from it. The Court shall therefore deny Defendants' motion to dismiss Count One for a failure to exhaust arbitration.

Counts Two and Four claim that the International wrongfully interfered with the CBAs by advising the Locals to breach provisions of those agreements. In its motion to dismiss, the International seeks to enforce the arbitration provisions of the CBAs and require Albertson's to arbitrate those claims. But the International is not a signatory to the CBAs. Under certain circumstances, the Ninth Circuit has allowed a nonsignatory union to enforce the terms of a CBA against a signatory employer. *McKinstry Co. v. Sheet Metal Workers' Intern.*, 859 F.2d 1382 (9th Cir. 1988). The nonsignatory union "must show that the signatories intended it to derive benefits from the agreement." *Id.* at 1384. More importantly for the issue now under consideration, the Circuit stated that "*the court* must inquire into the merits sufficiently to determine that the [nonsignatory union], by virtue of the agreement, does in fact have an arguable claim to receive a benefit from, or prevent an action on the part of, the signatory." *Id.* at 1384-85 n.2 (emphasis added). Although an arbitrator had made an initial determination of the union's authority to enforce the CBA, the Circuit gave no deference to the arbitrator's decision, reviewing it *de novo*. *Id.* at 1385. The Circuit held that the issue would be "decided by the

court, not the arbitrator, on the basis of the contract entered into by the parties." *Id.*

A fair reading of *McKinstry* is that the Court — not an arbitrator — must decide whether a nonsignatory union — the International — has the legal authority to enforce the CBA against a signatory employer — Albertson's. The International has not discussed *McKinstry* in its briefing or argument, and has not described how the signatories to the CBAs intended to benefit the International. Thus, the International has not explained why it should be allowed to enforce the CBA. The International's motion to dismiss Counts Two and Four must be denied.

Count Three asserts that the Locals and the International breached the CBA. Once again, the International is seeking to enforce the arbitration provisions in the CBA to dismiss this Count. And once again the Court must deny the International's motion on the ground that the *McKinstry* test has not been discussed, much less established.[2]

With regard to the Locals, the claim of breach is arguably subject to the broad arbitration clauses. Under *Desert Palace*, the arbitrability of the breach claim against the Locals must be decided in the first instance by the arbitrator. This would, however, splinter even further this already-fractured litigation. Sending the breach claims against the Locals to arbitration without even attempting to formulate a plan to simplify and centralize this litigation would violate the dictates of Federal Rule of Civil Procedure 1, that there be a "just, speedy, and inexpensive determination of every action."

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[2] The International has not sought to dismiss any of Albertson's claims on the ground that it is not a signatory to the CBAs and is hence not bound by them. It would have been difficult for the International to make such an argument at the same time it was attempting to enforce provisions of the CBAs against Albertson's. These remarks are simply observations intended to put the arguments in context.

Albertson's has been sued in three different courts under FLSA and state wage claims. If the breach claims against the Locals are sent to arbitration, the parties are stretched thin trying to cover many different litigation fronts. And all parties are subject to inconsistent rulings. Would the arbitration proceedings against the Locals be consolidated? Or would separate arbitration proceedings need to be instituted against each Local? There may be inconsistent rulings as to whether the Locals violated the CBAs. Meanwhile, there is a substantial question whether the case against the International could proceed in this Court prior to the issuance of rulings in the arbitration. The claim against the International— interference with contract — depends on a finding that the Locals in fact breached the CBAs.

These various proceedings present complex problems. The Court is very reluctant to add to the complexity — and create a greater chance for inconsistent rulings — by sending the claims against the Locals to arbitration. All the parties are subject to prejudice, and the briefing and argument indicate to the Court that counsel have not given serious consideration to a plan for making this litigation manageable. The Court is not casting blame here; the issues counsel have dealt with are weighty, difficult, and time-consuming. This litigation was filed hurriedly out of necessity, and is typical of disputes like these. And the parties may have tried previously to devise a litigation plan acceptable to all. But any attempts at agreement obviously fell apart. Before the Court splits up this litigation any further, it wants to meet with counsel and explore options for simplification.

Under normal circumstances, Count Three would be referred to arbitration. But this litigation presents unusual circumstances. The Court finds that the demands of judicial efficiency and economy — along with the need to avoid inconsistent results — compels a finding that Count Three

should not be sent to arbitration at this time. The Court urges counsel to agree on a more centralized approach to this litigation. In its Order, the Court will direct counsel to set up a status conference with the Court to discuss a litigation plan.[3]

ALBERTSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT

1. Legal Standards for Determining Arbitrability of FLSA Claims

Albertson's seeks a partial summary judgment on Count One declaring that the Defendants must arbitrate their FLSA and state wage claims. The Defendants claim that public policy precludes arbitration of these claims. The Court has determined that this is the proper forum to resolve the public policy issue, and will now address that question.

The Court begins with the *Steelworkers Trilogy*. There, the Supreme Court declared that public policy favors the resolution of labor disputes through arbitration. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). This policy creates a strong presumption in favor of arbitrability. *Warrior and Gulf*, 363 U.S. at 582-83. This presumption is strengthened when the arbitration agreement contains broad language.

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[3] The Court recognizes that "[a]ctions pending in different districts may not be consolidated . . . ." 9 Wright & Miller, *Federal Practice and Procedure*, § 2382 at 435 (1995). On the other hand, "the possibility of consolidation may be a factor in persuading a court to transfer one of the actions to the district where the other is pending." *Id.* Without expressing any opinion on a specific solution, the Court simply notes that options include (1) stipulations to stay certain actions and proceed with a lead case to avoid inconsistent results; and (2) stipulations to transfer all cases to this District. There are undoubtedly many other options. The Court will welcome the input of counsel at the status conference.

Phoenix Newspapers v. Phoenix Mailers Local 752, 989 F.2d 1077 (9th Cir. 1993).

As discussed previously, the arbitration clauses here are broad. Some of those clauses require arbitration for all disputes "relating to working conditions arising out of this agreement." A dispute over wages and hours relates to "working conditions arising out of" the CBAs. Many of the CBAs do not, however, have this "working conditions" language. Rather, they contain language compelling arbitration for disputes "over the construction and application of the [CBA]." The Defendants assert that their FLSA and state wage claims are based entirely on statute and do not depend in any way on an interpretation or application of the CBAs. This argument was adopted under very similar circumstances in *Randolph v. Cooper Indus.*, 879 F.Supp. 518, 522-23 (W.D.Pa. 1994). There, the Court held that an employee was not required to arbitrate his Title VII claim in the face of CBA language requiring arbitration for all disputes involving "the interpretation or application of, or compliance with, the provisions of this agreement." *Id.* at 522. The Court held that the employee's Title VII claim was based entirely on a statute, and did not depend in any way on an interpretation of the CBA.

As persuasive as *Randolph* is, the Ninth Circuit has made it clear that broad arbitration clauses are to be interpreted broadly. *Phoenix Newspapers*, 989 F.2d at 1080. The Court will therefore assume that the arbitration clauses in this case generally cover wage and hour claims.

The party contesting arbitrability bears the burden of demonstrating how the language in the CBA excludes a particular dispute from arbitration. *Id.* at 1080. In the present case, the Defendants have not shown any express provision

excluding a particular grievance from arbitration.[4] "In the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, 363 U.S. at 584-85. And when the claim is based on statute — as here — one form of such "forceful evidence" is "that Congress intended to preclude a waiver of a judicial forum for [the statutory] claim." *Gilmer*, 500 U.S. at 26. "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, *or an inherent conflict between arbitration and the [statute's] underlying purpose." Id.* (emphasis added).

The Supreme Court discussed two inherent conflicts between arbitration and an employee's FLSA claim in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728

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[4] Some CBAs contain the following provision:

> In the case of a direct wage claim . . . which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claims for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.

Defendants make a persuasive argument that this clause permits FLSA and state wage claims to be brought in court. First, the Court would note that this clause is much narrower than that interpreted in *Desert Palace*, and would not trigger a presumption that the arbitrability of wage claims should be decided by the arbitrator. Instead, the confined nature of this clause leads the Court back to the general rule that courts decide questions of arbitrability. The FLSA claims appear to be "direct wage claims," and the courts could reasonably be construed to be "tribunals." A common meaning of the term "settlement" is to resolve or determine. But these same CBAs also include the broad arbitration clauses. Given the strong policy in this Circuit to find that the language of a broad arbitration clause covers most disputes, the Court is reluctant to adopt the Defendant's argument. The Court will therefore decline to rest its decision on this clause.

(1981). First, the Court stated that "even if the employee's [FLSA] claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration." *Id.* at 742. The Court continued:

> "Wage and hour disputes [under the FLSA] that are subject to arbitration under a [CBA] are invariably processed by unions rather than by individual employees. Since a union's objective is to maximize overall compensation for its members, not to ensure that each employee receives the best compensation deal available, a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole."

Id. at 742.

A second and independent line of reasoning employed by the Court was that arbitration is inferior to the judicial process. In support of this argument, the Court cited concerns about the competency of arbitrators to determine statutory claims, and "arbitral procedures less protective of individual statutory rights." *Id.* at 744.

The precise issue before the Court was whether an employee could bring an FLSA claim in federal district court after his claim had been denied in arbitration. Relying on both of the grounds discussed above — the inherent conflicts in arbitration and the inferiority of the arbitration process — the Court found that the employee's right to bring an FLSA claim in court is "not waivable." *Id.* at 745.

Barrentine's second line of reasoning — that arbitration is an inferior process — was soundly repudiated by later Supreme Court cases. *Gilmer*, 500 U.S. at 30-33. But

those same cases also reaffirmed *Barrentine's* first line of reasoning — that there are inherent conflicts between CBA-mandated arbitration and statutorily-granted individual rights. *Id.* at 34-35.

Gilmer held that a stockbroker was required to arbitrate an age discrimination claim brought under the Age Discrimination in Employment Act (ADEA). The Supreme Court reviewed many past cases where it had required the arbitration of claims based entirely on statute. *Gilmer*, 500 U.S. at 26. The Court held that there was nothing in the text or legislative history of the ADEA indicating that Congress intended to preclude arbitration of those claims. The Court then reviewed whether there was any "inherent conflict between arbitration and the ADEA's underlying purposes." *Id.* at 37. The Court concluded that there was no conflict, and thus arbitration was required.

In reaching that conclusion, the Court first repudiated past statements in a line of cases beginning with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and including *Barrentine*, that arbitration was inferior to the judicial process for resolving statutory claims.

But *Gilmer* did not overrule the other line of *Barrentine's* reasoning. In fact, *Gilmer* reaffirmed the High Court's long-standing concern that union representation in arbitration might not fully vindicate the important individual rights granted by statute. *Gilmer* itself did not involve a CBA, and the Court clearly implied that the result might be different if a CBA had been involved. The Court stated that "in the context of a [CBA], the claimants [are] represented by their unions in the arbitration proceedings." *Id.* at 35. The Court then reaffirmed *Barrentine's* concern that "in [CBA] arbitration, 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.'" *Id.* at 34 (quoting from *Alexander*, 415 U.S.

at 58 n. 19). This creates, according to the Court, "a tension between collective representation and individual statutory rights. . . ." *Id.* at 35. But because *Gilmer* did not involve a CBA and union representation, no such tensions existed. The Court therefore ordered arbitration.

Gilmer therefore repudiates *Barrentine's* mistrust of arbitration procedures generally, but reaffirms *Barrentine's* concern that there is a tension between collective representation and individual statutory rights. The Supreme Court draws a clear distinction between commercial arbitration — where the employee has control over the arbitration — and labor arbitration —where the employee gives up control to his union.

The Ninth Circuit has issued two important decisions recently on this issue. *Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996); *Local 246 Util. Workers Un. v. Southern Cal. Edison*, 83 F.3d 292 (9th Cir. 1996). *Kuehner* is a commercial arbitration case. It is of little help here since it is not a labor arbitration case, and hence did not discuss the tension inherent in union representation during arbitration. *Local 246* appears to be more helpful because it involved an FLSA claim brought by an employee governed by a CBA. There is some question, however, whether *Local 246* involved a broad, mandatory arbitration clause, and thus its precedential value is unclear. The Court will discuss both cases in more detail below.

In *Local 246*, employees of Southern California Edison brought FLSA claims in federal district court. The employees' union had entered into a CBA with Edison. Edison argued that the FLSA claims should be dismissed because "the employees failed to exhaust their contractual remedies under the [CBA]. The Circuit's opinion does not define any more specifically what it means by "contractual remedies," but the clear implication is that the CBA contained

an arbitration clause.[5] The Circuit stated that the FLSA wage and overtime provisions "are guarantees to individual workers that may not be waived through collective bargaining." *Id.* at 297. The Circuit cited *Barrentine* for the proposition that "Congress intended to give individual employees the right to bring their [claims] under the FLSA in court . . .." *Id.*, quoting from *Barrentine*, 450 U.S. at 745. The Circuit noted that the employees' claims were based entirely on the FLSA, and that "there is no dispute over what the [CBA] provides." *Id.* The Circuit concluded that "a claim based on substantive rights under the [FLSA] is not subject to an exhaustion requirement." *Id.*

In *Kuehner*, a stock broker brought an FLSA claim in federal district court. The broker was not represented by a union, and no CBA was involved. But the Broker did sign a separate contract containing a broad, mandatory arbitration clause. The employer moved to dismiss on the ground that the broker failed to exhaust his arbitration remedy. The Circuit stated that the burden was on the broker to prove that "Congress restricted the enforcement of contracts to arbitrate FLSA claims." *Id.* at 319. The Circuit concluded that nothing in the text or legislative history of the FLSA shows an intent to preclude arbitration. The broker then cited *Barrentine* for the proposition that arbitrators are incompetent to decide FLSA cases. The Circuit disposed of that argument quickly by pointing out that *Gilmer* modified that particular line of *Barrentine's* reasoning. The Circuit then concluded that the FLSA claims must be arbitrated.

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[5] The parties have submitted a copy of the CBA that was at issue in *Local 246*. Each party interprets various portions of that CBA as supporting its reading of *Local 246*. This Court is bound, however, by the four corners of the written decision. Provisions of a CBA not quoted in the decision cannot be used to interpret the decision. The Court will therefore disregard the *Local 246* CBA.

Kuehner did not involve a CBA or union representation, and thus did not discuss the line of *Barrentine's* reasoning that collective representation might prejudice FLSA claims. There is no doubt — as *Kuehner* held — that the text and legislative history of the FLSA provide no evidence of congressional intent to preclude arbitration. But that is only the first half of the disjunctive two-part *Gilmer* test for determining if statutory claims should be precluded. The other half of the *Gilmer* test looks to see if there is "an inherent conflict between arbitration and the [FLSA's] underlying purposes." *Gilmer*, 500 U.S. at 26. That is, should arbitration be precluded because an employee's individual statutory rights under the FLSA will not be fully protected by the union representative in CBA-mandated arbitration.

Kuehner never reached that issue because it did not involve a CBA or union representation. *Kuehner* is persuasive as far as it goes, but its direct holding only reaches a point already conceded by the Defendants: that nothing in the text or legislative history of the FLSA precludes arbitration.

Other jurisdictions have met the issue head-on. The Second Circuit held that an employee, covered by a broad, mandatory arbitration clause in a CBA, was not required to arbitrate his FLSA claims. *Tran v. Tran*, 54 F.3d 115 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996). The Court reached this result "[i]n the light of *Barrentine* and its renewed vitality under *Gilmer*." *Id.* at 117. The Second Circuit shared *Gilmer's* concern that in arbitration, the interest of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. *Id.*

Many courts have likewise concluded that CBA-mandated arbitration conflicts with the underlying purpose of statutorily-granted individual rights. *Bush v. Carrier Air*

Conditioning, 940 F.Supp. 1040 (E.D.Tex. 1996) (Title VII); *Jackson v. Quanex Corp.*, 889 F.Supp. 1007 (E.D.Mich. 1995) (§1981); *Randolph v. Cooper Industries*, 879 F.Supp. 518 (W.D.Pa. 1994) (Title VII and §1981); *Block v. Art Iron, Inc.*, 866 F.Supp 380 (N.D.Ind. 1994) (ADA); *Claps v. Moliterno Stone Sales, Inc.*, 819 F.Supp. 141 (D.Conn. 1993) (Title VII).

The Fourth Circuit, in a 2-1 decision, reached the opposite conclusion in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996). There, the Plaintiff Austin filed Title VII claims for gender discrimination against her employer in federal court before exhausting the mandatory arbitration procedures contained in a CBA. The Fourth Circuit held that the possibility that individual rights may not be furthered in arbitration could not overcome the fact that Austin specifically agreed to arbitrate her statutory disputes. *Id.* at 885.

Austin distinguished *Tran* by pointing out that Title VII's legislative history —unlike the legislative history of FLSA — contained indications that arbitration was to be encouraged. *Id.* at 882-83 n.2. *Austin* appeared to state that its decision might be different if Austin was alleging FLSA claims. *Id.* In addition, the *Austin* decision relied heavily on the CBA's arbitration clause language expressly providing that the employer would be bound by all laws preventing discrimination, and requiring arbitration for any dispute arising over discrimination.

Austin is distinguishable. Albertson's has not pointed the Court to any language in the CBAs containing express provisions requiring arbitration of statutory claims like that existing in *Austin*. The Court is also unaware of any FLSA legislative history showing an acceptance of arbitration as

found in Title VII's background. For these reasons, the Court declines to find that *Austin* is persuasive authority.

3. Analysis of Arbitrability of FLSA Claims

Gilmer sets out the standard of review: this Court must determine whether there is "an inherent conflict between arbitration and the [statute's] underlying purpose." *Gilmer*, 500 U.S. at 26. The underlying purpose behind the FLSA is "to give specific minimum protection to *individual* workers . . . ." *Barrentine*, 450 U.S. at 739 (emphasis in original). To fulfill this purpose, the FLSA "grants individual employees broad access to the courts." *Id.* at 740. The Supreme Court in *Barrentine* recognized — as quoted earlier — the inherent conflicts between arbitration and FLSA rights. The Ninth Circuit, while not directly addressing the issue, has held that employees need not "exhaust their contractual [CBA] remedies" because the FLSA contains "guarantees to individual workers that may not be waived through collective bargaining." *Local 246*, 83 F.3d at 297.

The concern that labor arbitration will not fully protect individual statutory rights is not idle speculation. The CBAs governing the present case, attached to the Declaration of Kathryn Bush, show that the unions maintain almost complete control of an employee's arbitration presentation. The arbitrators in some circumstances have already been chosen, giving the employee no voice in the selection. In other circumstances, the arbitrators are to be chosen by the "parties," meaning the union and the employer. Hypothetically, the employee might have some input in this situation, but there is nothing in the CBA requiring the union to listen to the employee's concerns.

Outside of its desire to remain as the bargaining representative, the only factor holding the union accountable

to the employee is the union's duty of fair representation.[6] And *Barrentine* has held that the union does not violate that duty by "taking a good faith position *contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.*" *Barrentine*, 450 U.S. at 742 n.20 (quoting *Humphrey v. Moore*, 375 U.S. 335, 349 (1964) (emphasis added)).

"[N]egligence in processing a grievance is insufficient to constitute a breach of the duty [of fair representation]." *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1447 (9th Cir. 1994). The union only breaches it duty when its conduct in processing the grievance "was arbitrary, discriminatory, or in bad faith." *Id.* And a union's decision "is arbitrary only if it lacks a rational basis." *Id.* In addition, the duty of fair representation does not require the union to furnish the employee with an attorney. *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480 (9th Cir. 1985).

These restrictions take on added meaning when the binding nature of the arbitrator's findings are recognized. "Where an arbitral determination gives full consideration to an employee's [statutory] rights, a court may properly accord it great weight." *Alexander*, 415 U.S. at 60 n.21. Any review of the arbitrator's award will be "both limited and highly deferential."

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[6] The duty of fair representation is inferred from the union's exclusive authority under the National Labor Relations Act, 29 U.S.C. §159(a), to represent all employees in a bargaining unit and "to act fairly when dealing with an employer on behalf of a member." *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1447 (9th Cir. 1994).

Sheet Metal Workers v. Madison Indus., 84 F.3d 1186, 1190 (9th Cir. 1996).[7] If the arbitrator's award is a plausible interpretation, it must be upheld "even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions." *Local No. 359 v. Arizona Mechanical & Stainless*, 863 F.2d 647, 653 (9th Cir. 1988).

Thus, an employee has little control over the arbitration, and then when freed to seek judicial review, is largely bound by the arbitrator's findings. This illustrates the inherent conflict between arbitration and the underlying purpose of FLSA to protect individual workers.

The Court does not reach this conclusion without reservation, however. The reasoning of the case law is troubling in both its sweep and nature. It would apply not only to statutory claims granting individual rights, but to any claim that protects individuals. This opens a gaping hole in the general rule favoring arbitration. And the conclusion is based, at bottom, on a profound distrust of unions — a distrust of the way unions handle employee grievances. *Gilmer* set aside past criticisms of arbitrators, but was unwilling to let go of its suspicions of unions. A legal principle based on suspicions lacks weight.

The specter of unions casting off individuals for some undefined collective good seems too remote to warrant ignoring the general rule favoring arbitration. Recent studies prove that arbitration remains a vitally effective forum to

[7] Section 301 of the Labor Management Relations Act authorizes the district courts to enforce or vacate an arbitration award entered pursuant to a collective bargaining agreement. 29 U.S.C. § 185(a); *Sheet Metal Workers v. Madison Indus.*, 84 F.3d 1186, 1190 (9th Cir. 1996). When such an action is filed, the arbitrator's decisions are reviewed under the standards discussed above. The Court expresses no opinion on the possibility that employees -under the CBAs involved in this case have no right to file suit under §185(a) because the CBAs specifically provide that arbitration will be final and binding.

resolve disputes. Evidence shows that "there is a strong probability" that a labor arbitration proceeding "will lead to final resolution of the claim." Amanda G. Dealy, *Compulsory Arbitration in the Unionized Workplace*, 37 B.C.L.Rev. 479, 506 (1996). An empirical study done on Title VII claims that were arbitrated shows that only about 17% of the claims were later litigated in court. *Id.* The Department of Labor has recently established a pilot program for the arbitration of FLSA claims on the ground that arbitration is less expensive and more efficient than judicial resolution. *See, Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor*, 62 Fed.Reg. 6690 (1997) (to be codified at 29 C.F.R. pts. 24, 825, and 1977) (proposed February 12, 1997).

Thus, there does not appear to be wide-spread dissatisfaction with the union's representation during arbitration. Certainly, the union's motivation to continue as the bargaining representative is a powerful force preventing shoddy representation. And the duty of fair representation is not entirely toothless. The employee is granted a jury trial, *Teamsters Local 391 v. Terry*, 494 U.S. 558 (1990), and the Ninth Circuit has found that "[a] union breaches its [duty of fair representation] if it ignores a meritorious grievance or processes it in a perfunctory manner." *Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir. 1995), *cert. denied*, 117 S.Ct. 56 (1996).

If the arbitration process is tainted by union negligence that does not rise to the level of a breach of fair representation, the employee may be relieved of the prejudice when he seeks judicial review under 29 U.S.C. §185(a). *Alexander* states that the weight given to an arbitrator's decision on statutory issues

> "must be determined in the court's discretion with regard to the facts and circumstances of each cased.

> Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with [the statute], the degree of procedural fairness in the arbitral forum, [and] adequacy of the record with respect to the issue [under consideration]. . . ."

Alexander, 415 U.S. at 60 n.21.

Thus, the employee has some protection from being bound in later court proceedings by an arbitrator's findings made after an inadequate proceeding. The courts have the discretion to give such weight to the arbitrator's findings as is due, given the procedures employed during the arbitration.

But *Barrentine* and *Local 246* did not consider these factors important enough to even mention. Those two cases stand for the proposition that there is an inherent conflict between arbitration and the underlying purpose of FLSA. *Gilmer* affirmed that portion of *Barrentine* on which the Court now relies. Thus, the Court, despite its reservations, is constrained to follow that precedent. The Court therefore denies Albertson's motion for partial summary judgment seeking a declaratory judgment that Defendants must arbitrate their FLSA claims brought in other courts.

4. Analysis of Arbitrability of State Wage and Hour Claims

Albertson's also seeks a partial summary declaring that Defendants' state wage and hour claims filed in California, Washington, and Florida must be arbitrated. But the same tensions that exclude FLSA claims from arbitration are present with the state claims. Albertson's has not argued that the state wage and hour laws are any less focused than FLSA on the protection of individual workers. There are no assertions that union representatives in arbitration will be less likely to sacrifice individual rights for collective goals when state wage and hours laws are being applied. In essence, the

Court has nothing before it indicating that this issue should be treated any differently than the FLSA issue. The Court will therefore apply the same reasoning, and find that the Defendants need not arbitrate their state law claims.

One final issue remains to be discussed here. It appears from the briefing and argument that the Defendants' state wage claims were not brought under §301. That raises a potential preemption issue. Generally, state law claims that require interpretation of the CBA are preempted by § 301. *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993). Defendants have argued throughout their briefing that their state wage claims are based entirely on state statutes and do not require interpretation of the CBA. Without conceding the point, Albertson's asserts that the Court need not reach the preemption issue. Albertson's is claiming here that the state wage claims should be arbitrated, not that they are preempted:

> Albertson's has not asserted that grievance-arbitration is required because claims under a state wage and hour statute are preempted by §301. . . . The Court need not find that state wage and hour claims are preempted by §301 in order to find that [Defendants] are contractually obligated to submit their claims to the grievance-arbitration process.

See, Albertson's Brief at 13-14. Because Albertson's has not raised the preemption issue, the Court expresses no opinion on that issue.

With these findings, the Court has fully adjudicated Albertson's motion for partial summary judgment, and will deny that motion. The Court will grant the Defendants motion to dismiss Count One.

DEFENDANT'S MOTION TO DISMISS

The Court has now dismissed Count One, leaving Counts Two, Three, and Four. Defendants have filed a motion to dismiss seeking to dismiss all these remaining counts.

Defendants' briefing claims that Albertson's

> improperly seeks to restrain the exercise by defendants and their members of their rights under Section 7 [of the NLRA, 29 U.S.C. §157] and the First Amendment of access to the courts, and it seeks to bar them from bringing wage claims under (l) the FLSA for which exhaustion is not required . . . and (2) state laws that are not based upon, nor depend substantially upon a disputed interpretation of a collective-bargaining agreement.

See, Defendant's Brief at 15.

Because the Court has now dismissed Count One, Albertson's no longer has any claims that attempt to block Defendants from pursuing FLSA or state wage claims. This motion will therefore be denied.

CONCLUSION

The Court shall therefore dismiss Count One, but retain the remaining Counts.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the Plaintiff's motion for partial summary judgment (Docket No. 14) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED, that the Defendants' motions to dismiss for lack of personal jurisdiction and venue

(Docket Nos. 96 & 100) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED, that the Defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim (Docket Nos. 37 & 96) shall be, and the same is hereby, GRANTED IN PART AND DENIED IN PART. The motion is granted to the extent it seeks to dismiss Count One on the ground that the FLSA claims are not subject to mandatory arbitration. The motion is denied in all other aspects.

IT IS FURTHER ORDERED, that the Defendants' motion to dismiss for failure to exhaust grievance-arbitration process (Docket No. 97) shall be, and the same is hereby DENIED.

IT IS FURTHER ORDERED, that Defendants' motions to vacate hearing and stay partial summary judgment (Docket Nos. 42 & 96) shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED, that within thirty (30) days from the date of this Order, Counsel shall contact the Court's Clerk LaDonna Garcia ((208) 334-9021) to set up a status conference to discuss the direction of this case.

DATED this 10th day of February, 1997.

/s/
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

[filed 97 Apr. 30 PM 2:36]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ALBERTSON'S, INC.,
Plaintiff,
v.
UNITED FOOD & COMMERCIAL
WORKERS, et al.,
Defendants.

CIV. No. 96-0398-S-BLW

MEMORANDUM DECISION

The Court has before it a motion for final judgment filed by Plaintiff Albertson's. The Court reviewed the briefing submitted by both parties and heard oral argument on April 21, 1997. The motion is now at issue. For the reasons expressed below, the Court will grant the motion.

This dispute arose when various local unions ("Locals") of the United Food & Commercial Workers International Union ("International") accused Albertson' s of requiring its employees to work without punching the time clock, and without getting paid -- work that is described as "off-the-clock." These Locals represent about a third of Albertson's employees pursuant to collective bargaining agreements ("CBAs"). The Locals and the International threatened to sue Albertson's on the ground that the off-the-clock work violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq*. Albertson's responded by filing this

suit against twenty Locals and the International, alleging four causes of action.

Count One is brought under § 301[1] of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a). It seeks a declaratory judgment that the Locals and the International breached the CBAs by failing to submit their off-the-clock claims to arbitration. Count Two, also brought under § 301, alleges that the International wrongfully interfered with the CBAs between Albertson's and the Locals by (1) persuading the Locals to withhold from Albertson's employee complaints about off-the-clock work, and (2) advising the Locals not to proceed to arbitration.

Count Three repeats the allegations of withholding information and bypassing arbitration, and alleges that by this conduct, the Locals and the International have breached the CBAs in violation of § 301. Count Four is the only claim not brought under §301. It asserts that the International's conduct in advising Locals to withhold information and to bypass arbitration constitutes an intentional interference with contract. Although Count Four does not specify which law is applicable, the briefing and argument made it clear that Count Four is based entirely on Idaho law.

Shortly after Albertson's filed its complaint here, the Locals and the International -- along with others -- filed suit against Albertson's in California, Washington, and Florida. The suit in California was filed in federal district court and

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[1] Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

alleges claims under the FLSA, along with claims under state wage and hour statutes. The Florida action was also filed in federal district court, and contains claims under the FLSA and state wage and hour statutes. The Washington action was filed in state court and contains claims that Albertson's violated state wage and hour statutes.

In those actions, the unions claim that Albertson's fosters a work-place atmosphere that encourages off-the-clock work. The suits assert that management gives work assignments knowing that the jobs cannot be completed within the employees' scheduled hours; that bonuses are paid to those who get a job done in "less" than the scheduled time; and that discipline, demotion, and/or discharge are often the result when an employee records his or her work time in excess of the scheduled hours needed to finish the work.

In the present case, Albertson's brought a motion for summary judgment seeking the dismissal of all four claims. The Court granted the motion with respect to Count One, but denied it as to the remaining Counts. In granting summary judgment on Count One, the Court ruled that the unions were not required to submit their FLSA claims to arbitration. The Court recognized the difficulty of this issue, and the split in the authorities.

Albertson's now seeks to appeal that ruling, and so has filed a motion for final judgment under Fed.R.Civ.P. 54(b). That Rule provides that the Court may enter a final judgment "as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The Ninth Circuit has held that Rule 54(b) certification "is proper if it will aid 'expeditious decision' of the case." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (quoting *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987)). *Ponsoldt* also recognized, however,

that "Rule 54(b) certification is scrutinized to prevent piecemeal appeals in cases which should be reviewed only as single units." *Id.* at 797-98. Even so, *Ponsoldt* ultimately held that "[t]he present trend is toward greater deference to a district court's decision to certify under Rule 54(b)." *Id.* at 798.

The Locals and International argue that Counts One through Four are so intertwined that they constitute a single claim. They cite Ninth Circuit authority holding that a partial adjudication of a single claim is not appealable even with a Rule 54(b) certification. *See, Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991). The Locals and the International assert that the Court only resolved a portion of the single claim stated in Albertson's complaint when the Court dismissed Count One but allowed the other three Counts to remain.

The Court disagrees. In Count One, Albertson's seeks a declaration that the Defendants have to arbitrate their FLSA claims. Counts Two, Three, and Four all contain claims that the Defendants either breached or wrongly interfered with the CBAs by withholding employee FLSA grievances from Albertson's. Theoretically, Albertson's could lose Count One, but prevail on Counts Two through Four. In other words, federal labor law may not require the arbitration of FLSA claims, but the CBAs may require divulging all employee FLSA grievances. Thus, the four Counts do not constitute a single claim as asserted by the Locals and the International. By resolving Count One, the Court has resolved one entire claim out of the four claims made in the case.

Although the four Counts do not constitute a single claim, it is clear that Count One predominates in terms of its importance to this litigation. *Ponsoldt* recognized, for Rule 54(b) purposes, the insights the District Court gains after dealing with a specific case for a time. *Id.* at 797. After

presiding over two hearings, and reading hundreds of pages of outstanding briefing, the Court has the strong impression that a resolution of the issues in Count One is crucial to an "expeditious decision" in this case. *Id.* Count One comprises the heart and soul of the dispute between the parties. In fact, a decision on Count One will have a profound effect not only on this suit but also on the numerous lawsuits filed in other courts that were discussed above.

For all these reasons, the Court finds, under Rule 54(b), that there is no just reason for delay, and expressly directs that a final judgment be entered. Pursuant to Rule 58, the Court shall enter a separate Judgment for that purpose.

DATED this 30th of April, 1997

/s/
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ALBERTSON'S, INC.,
Plaintiff,
v.
UNITED FOOD & COMMERCIAL
WORKERS, et al.,
Defendants.

CIV. No. 96-0398-S-BLW
JUDGMENT UNDER RULE 54(b)

Pursuant to the Memorandum Decision filed with this Judgment, and having found good cause therefore,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that a final judgment be issued under Federal Rule of Civil Procedure 54(b) on the ground that there is no just reason for delay, and that the Memorandum Decision and Order filed March 10, 1997 (Docket No. 162) shall be, and the same is hereby, declared a final judgment pursuant to Rule 54(b).

DATED this 30th day of April, 1997.

/s/
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

29 U.S.C. § 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action.

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection

for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

* * *

29 U.C.C. § 185. Suits by and against labor organizations

* * *

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

Supreme Court, U.S.
FILED
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No. 98-1270

In The

Supreme Court of the United States

ALBERTSON'S, INC.,

Petitioner,

v.

UNITED FOOD & COMMERCIAL WORKERS, INTERNATIONAL UNION, AFL-CIO AND CLC; AND LOCALS 44, 81, 367, 381, 555, 1105, 1439, 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 AND 1442, UNITED FOOD & COMMERCIAL WORKERS UNION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Where, as in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), general arbitration clauses in collective bargaining agreements do not clearly and unmistakably provide for arbitration of federal or state statutory wage claims, may union-represented employees pursue such statutory claims in court rather than in arbitration?

May an employer bring an action under Section 301 of the National Labor Relations Act for breach of collective bargaining agreements against the unions with whom it is a party to such agreements when, as in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers International*, 370 U.S. 254 (1962), the employer has not first availed itself of the grievance-arbitration mechanism established to address alleged violations of the agreements?

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STATEMENT OF THE CASE

Parties

Petitioner Albertson's, Inc., is a retail grocery chain that, at the time this suit was filed, operated over 800 stores in 19 states. Of Albertson's 85,000 employees, collective bargaining agreements ("CBAs") cover about 28,000 who are represented by thirty-two local unions of the United Food and Commercial Workers Union. Respondents are 20 of these local unions from Washington, Oregon and California ("UFCW locals" or "unions")[1] and the UFCW International Union ("International"). The employees are represented by the UFCW locals for purposes of collective bargaining for wages, hours and working conditions pursuant to Section 9(a) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. § 159(a).

Background and Nature of this Litigation

The International informed Albertson's in mid-1996 that it would assist current and former employees in bringing claims for off-the-clock work violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), and similar state wage and hour laws unless these claims could be informally resolved in a manner that protected the employees from retaliation. Albertson's responded by filing a preemptive action seeking, *inter alia*, to enjoin the International, the UFCW locals and the Albertson's employees they represent from bringing suit in state or federal court for unpaid wages under the FLSA or state law.

Albertson's sued pursuant to Section 301 of the NLRA, 29 U.S.C. § 185, and the Declaratory Judgment Act, 28 U.S.C. § 2201. In its first amended complaint, Albertson's seeks relief for alleged breaches of CBAs between the UFCW local unions and Albertson's. In Count I, Albertson's contends

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[1] UFCW Locals 44, 81, 367, 381, 1105 and 1439 (Washington); Local 555 (Oregon); Locals 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 and 1442 (California).

that "various UFCW locals and the employees they represent *breached their [CBAs]* by failing to submit statutory off-the-clock work claims to the negotiated grievance/arbitration process." Petition for Writ of Certiorari ("Pet.") at 5 (emphasis added).[2] Yet, as Albertson's concedes, the CBAs between the UFCW locals and Albertson's "typically provide that 'any grievance or dispute concerning the *application or interpretation* of any and all of the provisions' of the agreement shall be submitted to that agreement's dispute resolution procedures." Pet. 4 (emphasis added). None of the CBAs explicitly requires arbitration of any statutory claims, let alone arbitration of statutory wage claims.

The Consolidated Actions Litigation

Two days after Albertson's filed its suit, the first of the wage and hour actions was commenced on behalf of current and former employees, many of whom were represented by the UFCW locals. The employees' claims were for violations of wage statutes, not of the wage provisions of the CBAs. Numerous similar suits followed, all of which were consolidated in the District of Idaho before Judge Winmill, *In Re Albertson's Employment Practices Litigation*, MDL Docket No. 1215 (herein "the Consolidated Actions").[3] In the Consolidated Actions, 70 plaintiffs seek redress on behalf of thousands of current and former Albertson's employees – the

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[2] The Amended Complaint contains three other counts, also alleging breach of contract claims based on CBAs, not at issue here.

[3] The Consolidated Actions include: *Choate v. Albertson's, Inc.*, No. CIV 97-0473-S-BLW (D. Idaho) (originally filed Sept. 1996, Wash. Super. Ct.); *Gloege v. Albertson's, Inc.*, No. CIV 97-0513-S-BLW) (D. Idaho) (originally filed Sept. 1996, N.D. Cal); *Mitchell v. Albertson's, Inc.*, No. CIV-0527-S-BLW (D. Idaho) (originally filed Sept. 1996, S.D. Fla); *Barton v. Albertson's, Inc.*, No. CIV 97-0159-S-BLW (D. Idaho filed April 1997); and *Rose v. Albertson's, Inc.*, No. CIV-97-0183-S-BLW (D. Idaho filed April 1997). The Multi-District Litigation Panel ("MDL") subsequently ordered four additional cases transferred to the District of Idaho for consolidated proceedings.

majority of whom are not represented by any union – who have worked off the clock with the tacit or explicit approval of their store- and corporate-level managers. These plaintiffs ("Consolidated Action plaintiffs") allege that off-the-clock work by Albertson's employees has been widespread and pervasive, extending back over more than a decade, and that Albertson's managers have permitted and encouraged such work. These allegations are supported by thousands of sworn claim forms and statements.

Albertson's contends that it has maintained a strict written Time Clock Policy prohibiting off-the-clock work. Pet. 3. The plaintiffs in the Consolidated Actions contend that in practice, however, Albertson's uses this policy as a smokescreen to conceal widespread violations of the wage and hour laws and only sporadically enforces the policy at store level. The plaintiffs allege that Albertson's sets unrealistically high production quotas, couples them with unreasonably tight labor budgets that limit the number of scheduled work hours, and then preys on employees' fears and aspirations to exact compliance with the quotas through off-the-clock work. Continued employment of store-level department managers and substantial bonuses are contingent on meeting these unrealistically high production standards. Expectations to complete more tasks than can reasonably be accomplished within the time allotted are conveyed by store- and corporate-level managers with the message: "Get it done no matter what," "If you can't get it done in the allotted time, we'll get someone who can," or "I don't care what it takes, I just don't want to see any [recorded] overtime" – instructions that Albertson's candidly acknowledged less than one month after the first of the Consolidated Actions was filed can be understood as an order to work off the clock.

The Consolidated Action plaintiffs allege that Albertson's unrelenting pressure to reduce labor costs renders its written policy ineffective. Faced with the impossible task of completing too many work assignments in too little time, employees wanting to perform well, retain their jobs and wage levels, or advance in their careers predictably work off

the clock. As long as they do so without complaint, Albertson's turns a blind eye and profits from their unpaid work. But whenever management no longer is able – or for pretextual reasons no longer wishes – to feign ignorance of off-the-clock work, Albertson's blames the employee for violating the policy and takes disciplinary action.

Proceedings in the District Court and Ninth Circuit

Shortly after Albertson's filed this action, Albertson's moved for partial summary judgment on Count I for the UFCW locals' alleged breach of the CBAs for failing to submit to arbitration the statutory claims for violations of the FLSA and state wage and hour laws. The UFCW locals and International moved to dismiss, supported by the Secretary of Labor appearing as *amicus curiae*. Following the precedents of this Court in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the district court denied Albertson's motion and granted the respondents' motion, observing that there is an "inherent conflict between arbitration [under the CBAs] and the underlying purpose of FLSA to protect individual workers." App. 37a. Final judgment was entered on this count.

Affirming "on somewhat different reasoning" (App. 4a), the Ninth Circuit noted that this Court's decision in *Barrentine* "makes clear that the rights of employees arising out of the [CBA] are separate and distinct from those arising out of a statute such as the FLSA . . . . " App. 4a. The Circuit relied on this Court's distinction between "vindicat[ion] [of an employee's] contractual right under a [CBA]" and the "assert[ion] [of] independent statutory rights accorded by Congress." App. 5a-6a, *quoting Barrentine*, 450 U.S. at 745-46 and *Alexander*, 415 U.S. at 49-50. The Ninth Circuit further relied on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), and *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), which emphasized the " 'distinctly separate nature of . . . contractual and statutory rights' (even when both were 'violated as a result of the same factual

occurrence'),'" and the "concern that in collective bargaining arbitration, 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.' " App. 7a.

REASONS TO DENY THE WRIT

Summary

The Court should deny the writ for four reasons. *First*, as in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391, 396 (1998), this Court will not reach the question presented by Albertson's petition of whether an explicit "union-negotiated waiver of employees' statutory right to a judicial forum" is enforceable, because the "collective-bargaining agreement[s] in this case do[ ] not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum . . . . " (*Wright* at 396-97).

Second, there is no conflict between the Ninth Circuit's decision and the decision of any other circuit. Asserting such a conflict, Albertson's relies on *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), which held that a discharged employee covered by a CBA containing an express provision requiring compliance with all anti-discrimination laws and a clause requiring the arbitration of any dispute arising out of discrimination could not bring suit against her employer under Title VII of the Civil Rights Act of 1964. *Austin* does not conflict with the Ninth Circuit's decision here that employees have the right to bring claims under the FLSA whether or not the CBAs require arbitration of statutory claims. None of the CBAs explicitly require compliance with the FLSA or state wage statutes. Moreover, the Fourth Circuit itself in *Austin* distinguished its decision from a "wage and hour case," such as this involving an FLSA claim. *Austin* at 882-83 n.2.

Third, the Court also is likely not to reach the question presented by the petition, because Albertson's has failed to submit to the contractual dispute resolution processes its claims under Section 301 of the NLRA that the UFCW locals breached the CBAs by failing to arbitrate statutory wage

claims. Any breach of contract claims, which necessarily involve interpretation and application of the CBAs, must be addressed through the grievance-arbitration mechanism, which Albertson's failed to do.[4]

Fourth, whether or not the CBAs require arbitration of statutory claims, the Ninth Circuit correctly held that employees have the right to assert in court claims under the FLSA and comparable state wage and hour laws: Employees may not be required to arbitrate their statutory claims because of the tension between collective representation and individual statutory rights (*Barrentine*, *Alexander*, *Livadas*), and the impossible burdens individual arbitration of all manner of statutory claims would place on unions. In addition, employees may not be forced to sacrifice their individual statutory rights by resorting to the grievance-arbitration procedures of the CBAs which have more limited procedures and rights. *See Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

I. The Court Likely Would Not Reach the Question Presented by Albertson's Petition, Because the Agreements Do Not Clearly and Unmistakably Provide for Arbitration of Statutory Wage Claims.

The employees' claims in this case are for violations of wage statutes, not of the wage provisions of the CBAs. Under *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 396 (1998), any "CBA requirement to arbitrate [a statutory claim] . . . must be clear and unmistakable." In this case, as in *Wright*, the general arbitration clauses of the CBAs are "very general," "less-than-explicit" and do not "clear[ly] and unmistakabl[y]" provide for arbitration of statutory claims. *Id.* at 396. Consequently, as in *Wright* (at 396-97), this Court likely would not reach the question of whether an explicit "union-negotiated waiver of employees' statutory right to a

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[4] In contrast, the Consolidated Action plaintiffs' wage claims allege no violations of the CBAs and seek no damages for breach of the CBAs.

judicial forum" is enforceable, because the "collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum . . . . "

The dispute resolution provisions at issue in this case, by their express terms, do not apply to claims arising under the FLSA or state wage laws, or even to "matters under dispute," as in *Wright* (at 396), and apply only to disputes arising under the terms of the contracts. Likewise, the substantive contract provisions governing the parties' conduct regarding off-the-clock work do not agree to comply with the statutory obligations of the FLSA or state law. Simply put, the parties have neither agreed in their contracts to abide by the FLSA or state wage and hour laws, nor agreed "clear[ly] or unmistakabl[y]" to submit claims arising under these statutes to the contracts' dispute resolution processes. Thus, submission of FLSA and state wage claims to arbitration is not a prerequisite to their judicial resolution.

Albertson's asserts that it "presented substantial evidence" in its partial summary judgment motion that the CBAs contained a "clear and unmistakable" agreement to arbitrate statutory claims (Pet. 4, n.1), but fails to cite any such evidence, and indeed there is none.[5]

1. Albertson's concedes that the CBAs between the UFCW locals and Albertson's "typically provide that 'any grievance or dispute concerning the *application or interpretation* of any and all of the provisions' of the agreement shall be submitted to that agreement's dispute resolution procedures."

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[5] Contrary to Albertson's assertion that "the courts below assumed for purposes of their decisions that the [CBAs] at issue require the arbitration of statutory claims" (Pet. 8), the Ninth Circuit made no such assumption. Instead, the Ninth Circuit held that "employees covered by a [CBA] are entitled to take their FLSA claims to court *regardless of whether those claims may also be covered by the grievance-arbitration procedure*." App. 9a (emphasis added).

Pet. 4 (emphasis added).[6] None of the CBAs explicitly requires arbitration of any statutory claims, let alone arbitration of statutory wage and hour claims.

Indeed, the facts in *Wright* demonstrate that the arbitration clauses of CBAs here do not meet the "clear and unmistakable" standard. In *Wright*, language in a CBA providing for arbitration of "matters under dispute" was not sufficiently explicit to waive the right to a federal judicial forum for statutory claims because the language "*could* be understood to mean matters in dispute under the contract." *Id.* at 396

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[6] Below, with emphasis, appear the definitions of grievances subject to arbitration from the agreements submitted by Albertson's in support of its motion for partial summary judgment (CR 17, Exhibits to Declaration of Kathryn Bush):

> "Any grievance or dispute concerning the *application or interpretation of this Agreement*" (Exs. 1, 11, 16, 19, 20, 22);
>
> "All matters pertaining to the proper *application and interpretation of any and all of the provisions of this Agreement*" (Exs. 2, 3, 5, 6, 8, 9, 10, 12, 13, 14, 15, 21);
>
> "[Any] dispute over the *interpretation of the terms of this Agreement*" (Ex. 4);
>
> "[A]ny misunderstanding as to the true and clear *interpretation of any part of this Agreement*" (Ex. 7);
>
> "All matter pertaining to the proper *application or interpretation of this Agreement*, or any grievance or dispute arising hereunder" (Exs. 17, 18, 23);
>
> "[A]ll claims, disputes and grievance . . . over the *construction and application of this Agreement*, or relating to working conditions arising out of this Agreement" (Exs. 24, 25, 26, 28);
>
> "Any and all matters of controversy, dispute or disagreement . . . *arising out of or in any way involving the interpretation or application of the terms of this Agreement*" (Ex. 29);
>
> "[A] dispute, difference of opinion between the parties, and grievances of employees *involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement* . . . . " (Exs. 27, 30, 31).

(emphasis added). The provisions in the CBAs at issue here *must* "be understood to mean matters in dispute under the contract": the applicable provisions require arbitration only for such matters as "any grievance or dispute concerning the *application or interpretation* of any and all of the provisions of the agreement." See fn. 6 *supra*.

With respect to resolution of wage claims, the provisions in nearly all agreements with UFCW locals in California emphasize the absence of any waiver of a judicial forum by expressly giving employees the option to submit "direct wage claims . . . to *either* the grievance procedure . . . *or* to any other tribunal or agency which is authorized and empowered . . . " to enforce it.[7] In *Livadas*, this Court identified *this very language* as a case "when it could be said with 'positive assurance' that the parties did *not* intend that state-law claims be subject to arbitration." 512 U.S. 127-28 (citations omitted) (emphasis added).

2. The substantive contract provisions governing the parties' conduct regarding off-the-clock work do not obligate the parties to abide by the FLSA or state wage laws. Instead, the CBAs include their own extensive provisions governing wages, overtime pay, hours of work, and record keeping, and merely coincide with some of the statutory requirements, as outlined below. Albertson's identifies the following provision as typical (Pet. 4):

> The employer shall be responsible for payment for all hours worked, and an employee shall only work those hours specifically authorized by the employer. Accordingly, it is intended that there shall be no "free or time off-the-clock" work practices under this Agreement. Any employee found by the Employer or the Union to be engaging in such practice shall be subject to discipline, which may include termination.

This provision nowhere explicitly requires compliance with the FLSA or state wage statutes, and thus it is irrelevant to

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[7] See footnote 20 *infra*.

determining whether there have been violations of wage laws that require that such work be recorded and compensated.[8]

This typical provision contrasts with the CBA in *Austin*, where a divided panel of the Fourth Circuit concluded as a matter of contract interpretation that the plaintiff's claim under the ADA and Title VII were covered by mandatory grievance procedures of the contract. The CBA in *Austin* provided that the parties "*comply* with all laws preventing discrimination." (Emphasis added.) The same article also provided that the CBA "shall be administered in accordance with the applicable provisions of the Americans With Disabilities Act," and specified that "any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure." 78 F.3d at 879-80.

Nor does any other CBA at issue here contain provisions that explicitly require the parties to comply with the FLSA or state wage and hour statutes. Rather, nearly all of the CBAs[9] have provisions that set forth the parties' agreed-upon policy concerning off-the-clock work that in some ways mirror, and in other ways vary from, wage and hour statutory requirements. The CBAs with the Northwest locals contain substantially identical provisions that declare that there are to be "no 'free' or 'time-off-the-clock' work practices under this Agreement," and that "[a]ny employee found by the Employer

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[8] Indeed, one contract declares it irrelevant to the parties' recordkeeping obligation whether the FLSA applies by specifying that the employer agrees to keep time records in the same "manner as is prescribed by the applicable provisions of the Fair Labor Standards Act, whether or not that Act actually applies to the Employer." **CR 148 at No. 4** (§ 3.16, Locals 115, 120, 506, 532 & 588 (Retail Meat), 1991-1995). At most, this provision of this CBA adopts the FLSA standard for recordkeeping only, but imposes no contractual duty to obey the FLSA.

[9] The two exceptions are the contract regarding Max Foods stores with California Locals 135, 324, 770, 905, 1036, 1167, 1428, and 1442, 1994-1996 (**CR 148 at No. 3**), and that with California Locals 135, 439, 551, 770, 905, and 1036, 1994-1996 (**CR 148 at No. 2**), which have no such provision.

or the Union to be engaging in such practice shall be subject to discipline, which may include termination."[10]

In 11 of the Northwest contracts, the language prohibiting off-the-clock work is preceded with the additional statement that "[t]he Employer shall be responsible for payment for all hours worked and an employee shall only work those hours specifically authorized by the Employer."[11] Also, eight

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[10] CBAs with Local 1439: **CR 17 at Ex. 6** (§ 3.6, Tri-Cities (Meat Dealers), 1995-2000); **Ex. 10** (§ 5.6, Yakima (Grocery/Meat), 1995-1999); **Ex. 4** (§ 9.12, Spokane, WA (Retail Meat), 1994-1999); **Ex. 2** (§ 18.5, Walla Walla, WA (Meat), 1994-1999); **Ex. 3** (§ 5.10, Spokane, WA (Grocery), 1994-1999); **Ex. 5** (§ 5.10, Pasco, Kennewick & Richland Counties (Grocery), 1995-2000); **Ex. 7** (§ 5.11, Walla Walla, WA (Grocery), 1994-1999); **Ex. 8** (§ 5.6, Chelan, Douglas, Kittitas (Grocery), 1995-1999); **Ex. 9** (§ 15.4, Wenatchee County (Meat Dealers), 1996-1999).

CBAs with Local 44: **Ex. 14** (§ 15.04, Snohomish County (Meat Dealers), 1995-1998); **Ex. 12** (§ 2.06, Jefferson/Clallam (Meat Dealers), 1993-1996); **Ex. 18** (§ 9.1, Skagit County (Grocery/Meat), 1993-1996); **Ex. 23** (§ 9.1, Skagit County (Grocery/Meat), 1996-1999); **Ex. 17** (§ 9.1, Whatcom County (Grocery/Meat/Bakery/Deli/Bakery), 1996-1999).

Ex. 13 (§ 15.04, Local 81, King & Kitsap Counties (Meat), 1995-1998); **Ex. 16** (§ 21.1, Local 381, Kitsap & Northern Mason Counties (Grocery/Bakery/Deli), 1995-1998); **Ex. 19** (§ 21.1, Local 381, Jefferson & Clallam Counties (Grocery), 1995-1998); **Ex. 20** (§ 21.1, Local 367, Pierce County (Grocery/Bakery), 1995-1998); **Ex. 11** (§ 21.1, Local 367, Mason-Thurston Counties (Grocery), 1995-1998); **Ex. 21** (§ 12.10, Local 367, Pierce County (Meat Dealers), 1995-1998); **Ex. 22** (§ 21.1, Local 1105, King & Snohomish Counties (Grocery), 1995-1998); **Ex. 1** (§ 4.9, Local 555, Clark County (Grocery), 1994-1996).

CR 148 at No. 12 (§ 2.06, Local 44, Jefferson/Clallam (Meat Dealers), 1996-1999); **No. 35** (§ 5.6, Local 1439, Chelan, Douglas & Kittitas Counties, 1992-1995).

[11] **CR 17 at Ex. 9** (§ 15.4, Local 1439, Wenatchee County (Meat Dealers), 1996-1999); **Ex. 4** (§ 9.12, Local 1439, Spokane, WA (Retail Meat), 1994-1999); **Ex. 2** (§ 18.5, Local 1439, Walla Walla, WA (Meat), 1994-1999); **Ex. 22** (§ 21.1, Local 1105, King & Snohomish Counties (Grocery), 1995-1998); **Ex. 16** (§ 21.1, Local 381, Kitsap & Northern Mason Counties (Grocery/Bakery/Deli), 1995-1998); **Ex. 19** (§ 21.1, Local

add a final sentence that states: "Likewise, the employer shall not encourage, intimidate, or coerce an employee to perform off-the-clock work."[12]

The majority of Albertson's agreements with the California locals set forth the parties' agreed-upon policy concerning off-the-clock work in two provisions.[13] A "Recording Time" section requires Albertson's to post the following in all stores:

> The law and the Union Agreement require that all time worked shall be recorded daily, including starting and stopping time. All employees shall comply strictly with these requirements, and any employee failing to so comply shall be subject to discipline on the same basis as is followed with respect to any other violation of store rules or procedure.

This section also directs the union promptly to file a written report to the employer concerning "any observed violation by an employee of this reporting time provision or the working of unauthorized time," and states further that "the Employer will take the necessary steps with the employee to

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381, Jefferson & Clallam Counties (Grocery), 1995-1998); **Ex. 20** (§ 21.1, Local 367, Pierce County (Grocery/Bakery), 1995-1998); **Ex. 11** (§ 21.1, Local 367, Mason-Thurston Counties (Grocery), 1995-1998); **Ex. 21** (§ 12.10, Local 367, Pierce County (Meat Dealers), 1995-1998); **Ex. 14** (§ 15.04, Local 44, Snohomish County (Meat Dealers), 1995-1998); **Ex. 13** (§ 15.04, Local 81, King & Kitsap Counties (Meat), 1995-1998).

[12] CBAs with Local 1439: **CR 17 at Ex. 9** (§ 15.4, Wenatchee (Meat), 1996-1999); **Ex. 4** (§ 9.12, Spokane, WA (Retail Meat), 1994-1999); **Ex. 2** (§ 18.5, Walla Walla, WA (Meat), 1994-1999); **Ex. 3** (§ 5.10, Spokane, WA (Grocery), 1994-1999); **Ex. 5** (§ 5.10, Pasco, Kennewick & Richland Counties (Grocery), 1995-2000); **Ex. 7** (§ 5.11, Walla Walla, WA (Grocery), 1994-1999); **Ex. 8** (§ 5.6, Chelan, Douglas, Kittitas (Grocery), 1995-1999); **CR 148 at No. 35** (§ 5.6, Chelan, Douglas & Kittitas Counties, 1992-1995).

[13] Sections 16.2 & 16.3, **CR 17 at Ex. 25** (Local 588, 1992-1995); **Ex. 28** (Local 839, 1992-1995); **Ex. 24** (Local 1288, 1992-1995); **Ex. 31** (Local 373, 1992-1995); **Ex. 30** (Local 1179, 1992-1995). **CR 148 at No. 6** (Local 870, 1992-1995).

correct such violation." The section requires in the event of a second violation by the same employee, the employer must

> pay to the Welfare Fund provided for herein an amount equal to the overtime pay due and payable to the employee. In such case, the employee involved shall be subject to discharge; retaining, however, his right to appeal any such discharge under this Agreement.

Following this section is a provision denoted "Free Time," which states:

> When an employee willfully violates the provisions of this Agreement by working free time without the knowledge of the Employer, after a second written notice by the Union of this employee's repeated contract violation, the Employer agrees to discharge said employee within seven (7) days after receiving written notice of such violation.[14]

None of these contract provisions require compliance with the FLSA; each simply establishes the parties' respective rights and obligations under the CBAs with respect to the

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[14] One agreement contains a variation of these provisions. This "Falsification of Time Records" provision requires the employer and employee to maintain daily time records, and requires the employee to verify his time weekly. If there is a proven employee falsification of these records, in cases where the employer had no knowledge of the falsification, the employer may summarily dismiss the employee, and the employee is entitled only to pay for the time reported. Where it is shown that both the employee and the employer knew of the falsification, the employer may discipline the employee and pay him for all time worked by check mailed to the union. In such cases, where the employer pays the employee for work that was not recorded on the time report, the employer must pay an equal amount to the health and welfare fund. Claims in these cases are limited to the 90-day period prior to the date they are presented to the employer. Finally, if the time worked without pay is the result of coercion, and the employee has reported the coercion to the union within the prescribed period, the employer must make payments to the health and welfare fund, and the employee is not subject to discipline, and is entitled to pay for all time worked. **CR 17 at 29** (Art. 5, ¶ N., Locals 135, 324, 770, 1036, 1167, 1428 & 1442, 1995-1999).

recording of hours worked and the working of unrecorded time. The requirement in most of the California CBAs that Albertson's notify employees that the law requires that all time be recorded cannot be equated with an agreement to obey that law, let alone agreement to arbitrate alleged violations of it. Where the CBAs' provisions vary from the statutory requirements, it indeed would be anomalous to equate such provisions with an agreement to obey those laws.[15]

Under the FLSA, employers are required to maintain accurate time records (29 U.S.C. § 211(c)), and pay their employees at least the statutory minimum for all straight time hours as well as overtime pay for all hours worked over forty in a workweek (*see* 29 U.S.C. §§ 206, 207) that the employee is permitted to work, i.e., work performed with the actual or constructive knowledge of the employer. *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). This statutory duty to compensate employees for all hours worked applies equally to recorded and unrecorded work time. Unlike the FLSA, the CBAs place primary responsibility for proper record keeping and the prevention of off-the-clock work on the employee, imposing no explicit responsibility on Albertson's. Unlike the FLSA, all off-the-clock work provisions in the CBAs subject employees to discipline for off-the-clock work, even work permitted by Albertson's. Unlike the FLSA, the applicable

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[15] The CBAs recognize this potential conflict. The same agreements that include these "Recording Time" and "Free Time" provisions also make a brief reference to the FLSA in the preamble of the section concerning hours, overtime and Sunday premium pay, which provides that in the event the "Federal Wage and Hour Law" applies and "conflicts with the intent of this Agreement," the parties agree to renegotiate the agreement "to preserve the intended work week and the rates pertaining thereto." **CR 148 at No. 10** (§ 6, Local 588, 1992-1995); **No. 11** (§ 6, Local 839, 1992-1995); **No. 9** (§ 6, Local 1288, 1992-1995); **No. 8** (§ 6, Local 373, 1992-1995); **No. 7** (§ 6, Local 1179, 1992-1995); **Ex. 6** (§ 6, Local 870, 1992-1995). Plainly, this reference does not create any obligation on the part of Albertson's to comply with the FLSA as part of its contract.

CBA provisions impose no explicit duty on Albertson's to compensate employees for unrecorded hours of work.[16]

In sum, the off-the-clock work and related provisions at issue create rights and obligations under the parties' CBAs that are independent and separate, and in some ways vary from, those established by the FLSA. In no way can such provisions be interpreted as an explicit waiver of employees' statutory right to a judicial forum for resolution of statutory claims.

II. There Is No Conflict Among the Circuits.

There is no conflict between the Ninth Circuit's decision and the decision of any other circuit. In its effort to raise a conflict, Albertson's relies on *Austin*. As discussed above, unlike *Austin*, none of the CBAs at issue here contain provisions that explicitly require that the parties comply with the relevant statutory law. Further, the Fourth Circuit itself distinguished its decision from a "wage and hour case," such as this involving an FLSA claim. *Austin* at 882-83 n.2. The court found the case dissimilar to *Barrentine* and its progeny on the grounds that the FLSA, unlike Title VII and the ADA, "does not contain any provision encouraging arbitration," and because *Barrentine* "held that 'congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargaining compensation arrangement[.]' " 78 F.3d at 882-83 n.2, *quoting Barrentine*, 450 U.S. at 740-41.

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[16] The CBAs provide their own schedules of wage rates for the pertinent job classifications, which are separate and distinct from the FLSA's minimum wage requirement.

III. The Court Also Likely Would Not Reach the Question Presented by the Petition, Because Albertson's Has Failed to Submit to Arbitration its Breach of Contract Claims Involving the Interpretation and Application of the Collective Bargaining Agreements.

The Court also is likely not to reach the question presented by the petition, because Albertson's has failed to submit to arbitration its breach of contract claims involving interpretation and application of the CBAs. Section 301 requires, as Albertson's concedes (CR 17, Bush Decl., at 5-7), that Albertson's first seek arbitration before bringing suit over any alleged breach of the CBAs involving, or disputes concerning, the interpretation or application of those agreements.

An employer who has not fulfilled its promise to arbitrate "disputes . . . involving questions of interpretation or application of any clause or matter" covered by the contract may not bring a lawsuit alleging a breach of the CBA. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers*, 370 U.S. 254, 258 (1962). Dismissal is appropriate for failure to make use of the grievance procedure established in the CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220-21 (1985); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

Albertson's claims in Count I are based upon alleged breaches of the CBAs. Albertson's asserts, and the defendant unions dispute, that the CBAs include an agreement that Albertson's employees may not bring suit in state or federal court for unpaid wages under the FLSA or state law, as opposed to claims under the CBAs. This dispute concerns the application or interpretation of the CBAs – namely whether Albertson's and the UFCW local unions have agreed that statutory wage claims of the local unions' members must be submitted to arbitration, and, if so, whether the union's alleged failure to do so violates the CBAs. Accordingly, the

Court is not likely to reach the question presented by Albertson's, because of Albertson's failure to submit its claims to arbitration.

IV. Even if These Agreements Clearly and Unmistakably Provided for Arbitration of Statutory Wage and Hour Claims, the Ninth Circuit Correctly Held That Employees Are Not Required to Submit Such Claims to Arbitration Prior to Seeking Statutory Relief.

Even if the grievance-arbitration provisions of the CBAs between the UFCW locals and Albertson's clearly and unmistakably were applicable to FLSA and state statutory claims, the Ninth Circuit correctly held that the aggrieved employees are not required to exhaust such procedures before filing a statutory lawsuit under section 16(b). Albertson's contends that the Ninth Circuit misapplied this Court's prior decisions regarding the arbitrability of statutory claims. Pet. 9. But the Ninth Circuit's decision is solidly supported by this Court's decision in *Barrentine*, where the tension between collective representation and individual statutory rights was resolved in favor of individual rights guaranteed by the FLSA. Moreover, such a requirement would force employees to sacrifice statutory rights in the more limited grievance-arbitration procedures and rights of the CBAs.

A. In *Barrentine*, the Court held that unfavorable resolution of the employees' wage claims under collectively bargained dispute resolution procedures did not bar a subsequent lawsuit under the FLSA based on the same facts. The Court recognized that "[t]wo aspects of national labor policy [were] in tension in [the] case": one reflected in the nation's labor management laws, which promote collective bargaining and industrial self-government; and the other exhibited in statutes, such as the FLSA, which govern the individual employer-employee relationship and ensure covered employees certain substantive rights. 450 U.S. at 734-35. The Court reconciled the "tension" between the two statutory schemes in favor of the individual rights.

Observing that in section 16(b), the FLSA "grants individual employees broad access to the courts," the Court emphasized that "[n]o exhaustion requirement or other procedural barriers are set up [under the FLSA], and no other forum for enforcement of statutory rights is referred to or created by the statute." *Id.* at 740.[17] Furthermore, the Court noted that its prior decisions stressed the "nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act . . . [and] held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (citations omitted).[18] Likewise, the Court affirmed its earlier holdings that "congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Id.* at 740-41 (citations omitted).

The Court in *Barrentine* reasoned further that employees' FLSA rights to minimum wage and overtime pay are best protected in a judicial rather than an arbitral forum. In this regard, the Court underscored the substantial disadvantages of subjecting an employee's FLSA wage claims to arbitration.

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[17] The Court emphasized in *Barrentine* that a requirement to exhaust collectively-bargained dispute resolution procedures would undermine important legislative objectives. Congress enacted section 16(b) in the original statute of 1938 as a means to vindicate their individual rights to statutory wages. *See generally Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705-06 nn.15 & 16 (1945) (discussing legislative history).

[18] One of the decisions cited by the Court is *Brooklyn Bank v. O'Neil*, 324 U.S. 697 (1945). There, the Court held that an employee cannot contractually waive the right to recover liquidated damages guaranteed under section 16(b), reasoning that such a waiver would undermine Congress's purposes in enacting the FLSA "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." 324 U.S. at 706.

The Court observed that in processing the dispute in arbitration, the union, "without breaching its duty of fair representation, reasonably and in good faith" may sacrifice the statutory rights of individual employees in order to further the collective good of the bargaining unit; that even where the union vigorously supports the wage claim, arbitrators may not have the competence to determine the complex issues which typically arise under the FLSA; that "because the arbitrator's authority is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties . . . rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA[;]" and, finally, that arbitrators lack power to grant employees "as broad a range of relief." *Id.* at 742-45. The Court concluded that "FLSA rights . . . are independent of the collective bargaining process," belong to the workers as individuals, not as members of a labor union, and "are not waivable." *Id.* at 745.

The *Barrentine* Court relied extensively on the analysis in *Alexander v. Gardner-Denver Co.* There, the Court determined that an employee's unsuccessful arbitration of his claim under the non-discrimination clause of his union contract did not preclude a subsequent action under Title VII of the Civil Rights Act. *See also McDonald v. West Branch*, 466 U.S. 284 (1984) (award in an arbitration proceeding pursuant to a CBA not a bar to suit under 42 U.S.C. § 1983).

Albertson's suggestion (Pet. 8 n.4) that employees must at least exhaust arbitration before bringing suit is directly contrary to *Barrentine*. The Court in *Barrentine* made explicit that whether or not the employees had first submitted their FLSA claims to the grievance-arbitration process did not affect the Court's holding that the employees retained their right to sue under section 16(b). 450 U.S. at 731 n.6. The Court reached this conclusion despite the fact the dispute resolution provision at issue – covering "any controversy which might arise" – was broad enough to encompass the employees' FLSA claims, and that under the terms of the provision, the parties expressly agreed not to bring any "legal

proceedings without *first* using all possible means of settlement as provided in this Agreement . . . . " *Id.* at 731 n.5 (emphasis added).

As demonstrated above, the CBAs in this case do not contain coverage language as broad, nor do they expressly require prior submission of any dispute to the contract dispute resolution procedures.[19] Indeed, virtually all the California agreements include a provision which provides, to the contrary, that "[i]n the case of a direct wage claim . . . which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement *to either the grievance procedure provided for herein or to*

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[19] Albertson's contends that "*at the very least* the effect of the agreements is to require that statutory wage and hour claims be submitted to arbitration before they are pursued *de novo* in court." Pet. 8 n.4. This ignores that if the right to a judicial forum to adjudicate statutory claims were waivable – and indeed waived in this case – such claims would be subject to arbitration, the "outcome" of which under the CBAs is, Albertson's acknowledges, "final and binding" (Pet. 8 n.4), and not subject to trial *de novo* following arbitration. There is no provision in the CBAs here for submitting statutory claims to non-binding arbitration with right of trial *de novo* in court. Albertson's seeks to distinguish *Alexander*, *Barrentine*, *Gilmer* and *Livadas* on the basis that they "did not involve collectively bargained agreements to arbitrate statutory claims at all, much less requirements only that employees submit such claims to arbitration prior to filing suit . . . . " Pet. 11. Albertson's suggestion of a middle ground is supported neither in law nor fact. Either there is a waiver of the right to a judicial forum or there is not. If, as here, there is no waiver, then under *Wright*, there is no obligation to arbitrate the claim. To be sure, this Court in *Barrentine* permitted an employee to bring an FLSA suit following unsuccessful arbitration of the claim. But the Court found no obligation first to arbitrate the claim.

Moreover, Albertson's proposed trial *de novo* of claims of union members following individual arbitration would require at least two separate trials of the statutory claims of the Consolidated Action plaintiffs, one for non-union members followed by one or many trials for union members, an enormous waste of judicial resources.

any other tribunal or agency which is authorized and empowered to effect such a settlement."[20]

Noting that four of the plaintiffs had not brought any grievance proceedings prior to filing the FLSA suit, the Court in *Barrentine* declared that "our holding does not depend on whether petitioners formally filed grievances[.]" *Id.* at 731-32 n.6.[21]

This Court reaffirmed the continuing validity of *Barrentine* in *Gilmer*. In *Gilmer*, the Court held that a securities representative's agreement to arbitrate, contained in his industry registration application, was enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., and therefore, required him to submit his Age Discrimination in Employment Act ("ADEA") claim to arbitration. The Court distinguished *Barrentine*, as well as *Alexander* and *McDonald*, on several grounds, all of which support respondents' position here: Unlike the case before it, the *Barrentine* line of cases did not involve an agreement to arbitrate statutory claims, but rather contract-based wage claims arising under the CBA, and thus, the labor arbitrators in these cases lacked authority to resolve statutory claims; the *Barrentine* line of cases arose in the context of a CBA, and thus in the arbitration proceedings the employees were represented by

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[20] **CR 17 at Ex. 24** (§ 18.8, Local 1288, 1992-1995); **Exs. 25 & 26** (§ 18.8, Local 588, 1992-1995); **Ex. 27** (§ 18.8, Local 870, 1992-1995); **Ex. 28** (§ 18.8, Local 839, 1992-1995); **Ex. 29** (§ 15D.3., Locals 135, 324, 770, 1036, 1167, 1428 & 1442, 1995-1999); **Ex. 30** (§ 18.8, Local 1170, 1992-1995); **Ex. 31** (§ 18.8, Local 373, 1992-95); **CR 148 at No. 2** (§ 15.7, Locals 135, 439, 551, 770, 905 & 1036 (Max Foods Meat), 1994-1996); **No. 3** (§ 15.7, Locals 135, 324, 770, 905, 1036, 1167, 1428 & 1442 (Max Foods), 1994-1996) (emphasis added).

[21] Albertson's misplaces reliance (Pet. 15-16, 23-24) on *Satterwhite v. UPS*, 496 F.2d 448, 451 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974), to assert that FLSA claims are more suitable than discrimination claims to the collectively-bargained arbitral process. Given that *Barrentine* in effect overruled *Satterwhite*'s holding that an employee may not bring an FLSA lawsuit after he has unsuccessfully grieved under a CBA, *Satterwhite* is not persuasive authority.

their unions, and "an important concern therefore was the tension between collective representation and individual statutory rights[;]" and finally, the *Barrentine* line of cases "were not decided under the FAA." 500 U.S. at 35. Thus, the Court's decision in *Gilmer* in no way contradicts its earlier decisions in *Barrentine*, *Alexander*, and *McDonald*. Indeed, the Court has expressly said so:

> *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.*, ... *Gilmer* distinguished *Gardner-Denver* as relying, inter alia, on: the "distinctly separate nature of . . . contractual and statutory rights" (even when both were "violated as result of the same factual occurrence"); the fact that a labor "arbitrator has authority to resolve only questions of contractual rights," and the concern that in collective bargaining arbitration, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."

Livadas, 512 U.S. at 127 n.21 (citations omitted) (ellipsis within internal quotation added by the Court). *See also Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 411 (1988) (citing *Barrentine* approvingly, Court notes that "substantive rights in the labor relations context can exist without interpreting [CBAs]"); *Wright*, 119 S. Ct. at 396 (noting that employee's statutory cause of action "is distinct from any right conferred by the [CBA]").

Although *Gilmer* may reflect greater judicial tolerance for arbitration in certain circumstances, the rights guaranteed under section 16(b) of the FLSA are individual rights and should not be limited by views as to the collective good of the bargaining unit. *Barrentine*, 450 U.S. at 742-45.[22] Contrary to

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[22] Albertson's assertion (Pet. 14 n.7) that tension between individual and collective interests, as in the context of labor arbitration, also exists in the context of UFCW-sponsored lawsuits is untrue, because the union would be unable to sacrifice individual claims given the rigorous judicial

Albertson's assertion, a union's duty of fair representation[23] does not contain adequate safeguards to ensure that individual statutory rights can be protected in a collectively-bargained dispute resolution setting.

While the doctrine is "an important check on the arbitrary exercise of union power," it is "a purposefully limited check, for a 'wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.' " *United Steelworkers v. Rawson*, 495 U.S. 362, 374 (1990), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). A union does not violate that duty by "taking a good faith position *contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.*" *Barrentine*, 450 U.S. at 742 n.20, *quoting Humphrey v. Moore*, 375 U.S. 335, 349 (1964) (emphasis added).

Thus, "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Barrentine* at 742.[24]

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oversight of class certification and settlement provided by Fed. R. Civ. P. 23. Moreover, counsel in the Consolidated Actions control the litigation, not the union, as the district court has previously found. In addition, employees must **individually** consent to participate in collective actions brought under section 16(b).

[23] Under the doctrine of fair representation, the union's "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A breach occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

[24] In so holding, the Court recognized "a union's objective is to maximize overall compensation of its members, not to ensure that each

The propriety of such a balance also reflects the Court's recognition that labor "arbitration may be expensive[.]" *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375 (1984) (footnote omitted). "The cost of arbitration is at least one reason why this Court has declined to agree that individual employees represented by the union have an absolute right to have their grievances taken to arbitration." *Id.* at 375 n.19, *citing Vaca v. Sipes*, 386 U.S. at 191-92. "The union may exercise its discretion in good faith to settle grievances 'prior to the most costly and time-consuming step in the grievance procedures.' " *Id.*, *quoting Vaca* at 191. To require as a general rule that unions arbitrate individual employment claims of all sorts, including FLSA and state-law claims as in this case, would be so burdensome as ultimately to defeat the employees' collective bargaining interest in having a strong and effective union. *See Peterson v. Kennedy*, 771 F.2d 1244, 1255 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).[25]

Citing *Barrentine*'s "renewed vitality under *Gilmer*," the only other appellate court to confront a CBA's arbitration requirement in the context of FLSA rights held that exhaustion is not required. *Tran v. Tran*, 54 F.3d 115, 118 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1417 (1996). In *Tran*, the Second Circuit concluded that "nothing in *Gilmer* . . . appears

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employee receives the best compensation deal available . . . . " *Barrentine* at 742. Other aspects of the doctrine are inconsistent with effective representation of individual statutory rights. For example, "mere negligence, even in the enforcement of a [CBA], would not state a claim for breach of the duty of fair representation . . . . " *United Steelworkers v. Rawson*, 495 U.S. at 372.

[25] A result in this case that would require union-represented employees individually to exhaust CBA procedures, and thereby effectively preclude their availment of the advantages of class and collective action litigation, while permitting Albertson's non-union employees to proceed "would turn the policy that animated the Wagner Act on its head" by "penaliz[ing] workers who have chosen to join a union by preventing them from benefiting from" such procedures. *Livadas*, 512 U.S. at 129 (citation omitted) (invalidating state policy of not enforcing state wage law on behalf of employees covered by CBA arbitration procedures).

to throw anything but favorable light upon the continuing authority of *Barrentine*." *Id.* at 117. Thus, the court determined that the employee could pursue judicial remedies without seeking prior arbitration of his FLSA back pay claims. *Id.*[26]

Moreover, since *Gilmer*, the overwhelming majority of appellate courts addressing the issue under statutes other than the FLSA also have upheld an employee's right to sue without exhausting collectively-bargained arbitration procedures, regardless of whether the employee's union has agreed to

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[26] Albertson's relies on *Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996); *Hampton v. ITT Corp.*, 829 F. Supp. 202 (S.D. Tex. 1993); and *Leahy v. City of Chicago*, 96 F.3d 228 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1818 (1997). But *Kuehner* is readily distinguishable. The Ninth Circuit, following *Gilmer*, determined that a stockbroker could not pursue relief under the FLSA before submitting her claims to arbitration, in light of her arbitration agreement in her securities registration form, which was subject to the FAA. The case did not involve a collective bargaining or other employment agreement, but an individual registration agreement. Thus, as the court pointed out, the case differed from *Barrentine* because *Barrentine* was " 'not decided under the FAA.' " 84 F.3d at 320, *quoting Gilmer*, 500 U.S. at 35. *Hampton v. ITT Corp.* likewise is distinguishable on these grounds.

In *Leahy*, a Seventh Circuit panel held, over a strong dissent by Judge Cudahy, that because a CBA provided that a police officer is entitled to overtime pay for hours worked in excess of eight hours per day, that indicated that if an officer works more than eight hours in a day as a result of working during a meal period, the City will pay overtime rates for the excess work time. The court thus dismissed a complaint by officers claiming that their meal periods constituted compensable time under the FLSA. The rationale of the majority was based on its view that in computing work hours under the FLSA, "employers and employees may resolve whether certain activity is 'work' through a [CBA], as long as the agreement comports with the FLSA." *Id.* at 232. The panel's suggestion that the agreement's grievance process is "the most efficient way to determine whether an officer's meal period should be compensable work time" (*id.*), although erroneous in our view, in no manner endorses a broad doctrine requiring exhaustion prior to filing a statutory claim.

arbitrate statutory claims.[27] The exception is *Austin*, which is both distinguishable for the reasons discussed above, and wrongly decided.[28]

The Ninth Circuit correctly held that employees are not required to submit their statutory wage claims to collectively-bargaining arbitration procedures prior to bringing suit.

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[27] *See Penny v. UPS*, 128 F.3d 408, 414 (6th Cir. 1997) (concluding, where CBA provided for arbitration of ADA claims, "employee whose only obligation to arbitrate is contained in a [CBA] retains the right to obtain a judicial determination of his rights under . . . the ADA"); *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (ADA) (holding arbitration of federal statutory claim not required, *unless* three requirements are met: the employee agreed individually (not through his union) to contract containing arbitration clause, the arbitrator is authorized to resolve federal statutory claims, and employee has the right under contract to insist on arbitration if statutory claim is unsatisfactorily resolved in grievance process); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 n.2 (10th Cir. 1997) (Title VII) (adopting, without having before it the pertinent CBA, "majority view . . . that *Alexander* and its progeny 'remain good law and that statutory employment claims are independent of a [CBA]'s grievance and arbitration procedures' " (citation omitted)), *judg. vacated on other grounds*, 118 S. Ct. 2364, *on remand*, 158 F.3d 1371 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.) (ADA & ADEA) (holding union cannot waive employee's statutory right to judicial forum "by signing [CBA] that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement"), *cert. denied*, 118 S. Ct. 294 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996) (Title VII & state claims) (holding, without consideration of whether collectively bargained grievance provisions covered statutory claims, prior exhaustion not required), *cert. denied*, 519 U. S. 1110 (1997).

[28] *Austin* was wrongly decided for the reasons stated by the dissent. The majority failed to recognize that *Gilmer* and its progeny arose in the context of a private agreement (and not in the context of a CBA), which "makes all the difference." 78 F.3d at 886 (Hall, J., dissenting). As the dissent noted, "[a] labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim." *Id.* In addition, the dissent noted further, *Gilmer* did not overrule the *Gardner-Denver* line of authority, and "*Gardner-Denver* is the law." *Id.* at 887.

B. The other substantial disadvantage to employees of subjecting their FLSA and other statutory wage claims to arbitration is the more limited procedures and rights available under the CBAs. As with the CBAs in this case, labor arbitrators often lack the power to grant employees the necessary statutory relief. For example, although employees might recover the back wages owed under CBA dispute-resolution provisions, the contract remedies neither provide full relief for FLSA violations, nor serve to deter future violations, as does a section 16(b) suit, because none of the agreements provide for liquidated damages. Several California agreements authorize an award of 7% interest on monetary claims (see CR 17 at Ex. 28, 24 & 30 (§ 18.7); CR 148 at Nos. 6 & 10 (§ 18.7)), but such interest is not comparable to the double damages provided in an FLSA liquidated damages award. In addition, as discussed above, the CBAs have provisions that vary from, and in some cases are inconsistent with, the FLSA and many state wage statutes. For example, the latter provide for recovery of attorneys' fees by prevailing employees. *E.g.* 29 U.S.C. § 216(b); Cal. Labor Code § 1194; Ore. Rev. Stat. 652.200; Wash. Rev. Code 49.46.030. By contrast, the CBAs here have no such provisions; and some impose the arbitrator's fees on the losing party (*e.g.* CR 17, Ex. 1, § 18.1), while others require such fees to be borne equally by each party (*e.g. id.*, Ex. 2, § 19.2). If only in a trial de novo are the full panoply of remedies available, an arbitration proceeding is meaningless and a massive waste of resources.[29]

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[29] Albertson's mistakenly relies (Pet. 23) on the Labor Department's proposed pilot test program using alternative dispute resolution in a select group of employment law cases, including FLSA cases (*see* 62 Fed. Reg. 6690 (1997)). As the Secretary of Labor stated in her amicus brief to the Ninth Circuit at 18-19 n.24 (emphasis in original):

> Under the proposed program, FLSA claims are *not* the subject of arbitration. Rather, after investigation of the FLSA complaint, the failure of administrative efforts to settle the case, and a determination that the case meets certain criteria, the Department will offer the employer and employee the option of voluntary *mediation. See* 62 Fed. Reg. at 6693-6694.

Moreover, unlike the arbitration provisions in *Gilmer*, short limitations periods apply to filing grievances under the CBAs in this case. *E.g.* CR 17, Ex. 1, § 18.1 (20 days). Nor would a labor arbitrator necessarily have authority to toll the FLSA statute of limitations during the arbitration process. *See Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 65-66 (1953) (pursuit of administrative relief does not toll § 16(b) limitations period). Where off-the-clock work is alleged, the statute of limitations operates to cut off employees' claims pay period by pay period. *E.g. Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (separate cause of action accrues each payday). Thus, even if trial de novo in federal court were available, important substantive rights would be lost.[30]

Moreover, in selecting appropriate cases for mediation, the Department will not "recognize any prior agreement that makes the use of mediation or arbitration a condition of employment or otherwise prospectively requires the use of ADR in an employment dispute." *Id.* at 6694.

[30] Even outside labor arbitration, such disadvantages in the arbitration, as contrasted to the judicial arena, render arbitration provisions unenforceable. *E.g. Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995) (franchisees not required to exhaust arbitration under agreement covered by FAA because they would lose important federal statutory remedies, such as statutory periods of limitations, exemplary damages for willful violations, and attorneys fees for prevailing parties); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) (affirming refusal to compel arbitration under clause providing for arbitration of any claim arising from employment but further providing that damages could be awarded for breach of contract only).

CONCLUSION

For the foregoing reasons, respondents request that the petition be denied.

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No. 98-1270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSON'S, INC.,
Petitioner,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO AND CLC; and LOCALS 44, 81, 367, 381, 555, 1105, 1439, 135, 324, 373, 588, 770, 839, 870, 1036, 1167, 1179, 1288, 1428 and 1442, UNITED FOOD & COMMERCIAL WORKERS UNION,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. Respondents' Argument That Certiorari Should Be Denied Because The Parties' Collective Bargaining Agreements Do Not Require The Arbitration Of Statutory Off-The-Clock Work Claims Is Not Supported By Either The Law Or The Record

Citing this Court's decision in *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998), Respondents argue that certiorari should be denied because the parties' collective bargaining agreements do not contain a "clear and unmistakable" waiver of employees' rights to a judicial forum for resolution of claims that Albertson's required employees to work "off the clock" in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") and similar state laws. Opp. at 5, 6-15. Respondents' argument should be rejected for three reasons.

First, the standard announced in *Wright* should not apply here, because Albertson's does not contend that the arbitration provisions at issue constitute a waiver of the employees' right to pursue their statutory claims in court. Rather, Albertson's contends that the agreements should be read to require only that employees must attempt to resolve such claims through the contractual grievance/arbitration procedures before pursuing them in court. Because an agreement to exhaust such procedures before proceeding in court does not involve a waiver of a judicial forum, there is no reason to require that the agreement meet the standard announced in *Wright*.

Second, even if *Wright* were found to apply, neither the parties nor the courts below have had an opportunity to evaluate the adequacy of the pertinent arbitration provisions under *Wright*, which was decided after the court of appeals issued its decision in this case. This Court should not base its decision on an untested assumption about the ability of a party to satisfy standards that did not exist at the time the

record on review was created. That is particularly true here, where Respondents attempted to persuade both the district court and the court of appeals that the arbitration provisions did not cover off-the-clock claims arising under the FLSA and state law, but neither court saw fit to decide the case on that basis.[1] As discussed below, Albertson's presented substantial evidence to support its position that the arbitration provisions were in fact intended by the parties to cover statutory off-the-clock claims. In these circumstances, the Court cannot fairly assume that, given the opportunity, Albertson's would be unable to demonstrate that the agreements at issue in this case satisfy the requirements of *Wright*. If the Court believes that *Wright* is potentially applicable in the circumstances of this case, it would be appropriate to remand this case to the lower courts for consideration of whether *Wright* applies where the agreement requires only exhaustion, not waiver, and if it applies, whether its requirements are satisfied by the agreements at issue here.

Third, Respondents' argument is based on an overly narrow reading of *Wright*. To be sure, *Wright* holds that, in order to be effective, a union's waiver of employees' rights to a judicial forum for resolution of statutory claims must be clear and unmistakable. 119 S. Ct. at 396-97. Respondents apparently read the Court's decision to mean that a waiver

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[1] The district court, noting the breadth of the arbitration clauses, assumed that the agreements were broad enough to encompass statutory FLSA claims (App. 27a), and the court of appeals, acknowledging the district court's assumption, tacitly adopted the same assumption. Although Respondents challenge Albertson's assertion that the court of appeals, like the district court, assumed for purposes of its decision that the agreements required arbitration of statutory claims (Opp. at 7 n.5), a simple reading of the Ninth Circuit's decision makes clear that its examination of the case law would have been unnecessary in the absence of such an assumption. App. 4a-9a.

can be effective only if the arbitration clause itself, standing alone and without consideration of other portions of the agreement or other available indicia of the parties' understanding, expressly provides for a waiver.

Such a reading of *Wright* is unwarranted by the rationale underlying the Court's decision. In *Wright*, the general arbitration clauses at issue, although broad, did not explicitly refer to statutory claims of any kind. The employer apparently relied only upon the breadth of the clauses and a presumption in favor of arbitration to establish a waiver. In rejecting the sufficiency of the employer's evidence to establish a waiver, the Court made clear that it was not precluding the consideration of evidence other than the arbitration clause to establish waiver, but rather was saying only that an intention to submit statutory claims to arbitration could not be presumed. "It may well be that ordinary textual analysis of a CBA will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration; but they will not be *presumed* to be so." 119 S. Ct. at 396 (emphasis in original). And although the Court went on to discuss the need for any waiver to be "explicit," *id.*, the Court gave no indication that it was overruling *sub silentio* the long line of judicial authority holding that collectively bargained agreements can take their meaning from more than the literal words of the provisions at issue. *See, e.g., Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. 693, 708-09 (1983) ("we do not doubt that prior arbitration decisions may be relevant . . . in interpreting bargaining agreements" (footnote omitted)); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) (in "the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are

intended to serve"); *Transportation-Communications Employees Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 161 (1966) ("In order to interpret [a collective bargaining agreement] it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."); *Teamsters Indus. Emp. Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir. 1993) (extrinsic evidence to be considered in contract interpretation includes "the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning").[2]

Moreover, the exclusion of such pertinent evidence of intent would serve to frustrate the legitimate expectations of many parties to pre-*Wright* collective bargaining agreements, whose undisputed and manifest intent may have been to require the arbitration of statutory claims but who, not having the benefit of *Wright* at the time of their negotiations, did not happen to craft their agreement in language that would satisfy the recently imposed standard. Such parties should not be precluded from establishing their intent through traditional means.

Unlike the employer in *Wright*, Albertson's proffered substantial evidence to support its position that the arbitration clauses of its collective bargaining agreements were intended

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[2] The requirement in *Wright* that a waiver be clear and unmistakable was adopted from *Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. at 708. Although the Court in that case rejected a contention that "the union's failure to change the relevant contract language in the face of two prior arbitration decisions constitutes an implicit contractual waiver," *id.*, it did so only because it found the two decisions insufficient to establish a pattern clear enough to convert the union's silence into a waiver. *Id.* at 709. The Court clearly indicated that in the appropriate circumstances, prior arbitration decisions could provide a basis for finding a "clear and unmistakable" waiver. *Id.*

to require the arbitration of claims arising under wage and hour laws such as the FLSA. Albertson's collective bargaining agreements with the UFCW locals contain provisions that clearly prohibit off-the-clock work pursuant to federal and state wage and hour laws. *See* CR 17 (Decl. Of Kathryn Bush) at ¶¶ 3-8. For example, many of the California agreements explicitly provide that "*the law* and the Union Agreement require that *all time worked* shall be recorded daily, including starting and stopping time." *Id.* at ¶ 4 (emphasis added). Similarly, the agreements with all of the Washington locals uniformly state, "[I]t is intended that there shall be no 'free or time off-the-clock' work practices under this Agreement." *Id.* at ¶ 3.

As Albertson's argued below, the parties' use of terms such as "the law," "all time worked," and "free" and "off-the-clock" work in their collective bargaining agreements reflected their intent to incorporate statutory claims for off-the-clock work into those agreements, and to make such claims subject to the grievance-arbitration procedures. Respondents themselves used such terminology to allege violations of the FLSA and state wage and hour laws in their complaints and pleadings in this action, and the Department of Labor commonly uses such terminology in its own litigation under the FLSA. *See, e.g., Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381 (9th Cir. 1987); *Reich v. Petroleum Sales, Inc.*, 30 F.3d 654 (6th Cir. 1994); *Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied sub nom. Norman's Country Mkt., Inc. v. McLaughlin*, 487 U.S. 1205 (1988). That the negotiated contract provisions do not precisely mirror the FLSA and similar state laws in all respects does not alter the fact that the parties' use of the statutory terminology reflects their mutual intent to make claims for wage and hour violations subject to the contractual dispute resolution process. Indeed, this intent is

confirmed by the parties' longstanding prior practice of submitting off-the-clock claims to the grievance process. CR 17 at ¶ 19, exh. 35.

Thus, in contrast to the employer in *Wright*, Albertson's does not rely solely upon a broad arbitration clause and a presumption in favor of arbitration to establish the necessary waiver, but instead points to additional provisions of the pertinent collective bargaining agreements and the parties' past practice to show an understanding and intent that off-the-clock claims arising under the FLSA and state statutes were to be subject to the contractual grievance/ arbitration process. *See* CR 17 at ¶¶ 9-15. In these circumstances, there can be no justification for simply assuming that the collective bargaining provisions at issue cannot meet the standards announced in *Wright*.

II. The Court Should Not Deny Certiorari Because Of Albertson's Alleged Failure To Exhaust Its Contractual Remedies

Respondents' suggestion that the Court should deny certiorari because of Albertson's failure to submit to arbitration its claim that statutory wage claims are subject to the contractual dispute resolution process (Opp. at 16-17) is without merit. Albertson's does not seek judicial resolution of any contract-based claim; rather, Albertson's seeks only an order requiring Respondents to comply with their contractual obligation to submit their off-the-clock work claims to arbitration. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides for jurisdiction over such efforts to enforce collectively bargained arbitration clauses. *See, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 449-51 (1957); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651 (1986) ("It was for the court, not the arbitrator, to decide in

the first instance whether the dispute was to be resolved through arbitration"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("The Congress has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate.").

III. Respondents' Remaining Arguments Demonstrate That The Issue Raised By The Petition Is Substantial And Warrants This Court's Attention

The remainder of Respondents' opposition is devoted to a discussion of their view of the merits of the arguments presented in Albertson's petition, which need not be repeated here. By their nature, Respondents' contentions serve to confirm that the issue presented by Albertson's Petition is substantial and important, and requires resolution by this Court.

Only a few points raised in Respondents' Opposition require response here. Respondents first dispute Albertson's assertion that the Ninth Circuit's ruling conflicts with the rationale underlying the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996), which held that a collectively bargained agreement to arbitrate a statutory claim arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was enforceable. Opp. at 15. Respondents note that the Fourth Circuit expressed the view that the absence of a statutory provision in the FLSA encouraging arbitration would require a different result in a case seeking to arbitrate a claim arising under that statute. 78 F.3d at 882-83 n.2. This statement, however, was pure dicta, and for all the reasons set forth in Albertson's petition is wrong in any event. Respondents also cite the Fourth Circuit's interpretation of *Barrentine v. Arkansas-Best*

Freight System, Inc., 450 U.S. 728 (1981), as indicating that arbitration is not available under the FLSA. Again, however, this dicta cannot be squared with the Court's actual reasoning in *Barrentine*, and in any event does not alter the fundamental fact that the rationale adopted by the Fourth Circuit in enforcing a collectively bargained agreement to arbitrate a claim under Title VII conflicts with that adopted by the Ninth Circuit in this case.

Respondents' discussion of this Court's precedents regarding the arbitrability of statutory claims (Opp. at 17-26) requires little response beyond that presented in the Petition. Significantly, however, Respondents place principal reliance on *Barrentine*, asserting at one point that the Court concluded in that case that employees retained a right to sue for violations of the FLSA whether or not they had submitted their claims to the contractual grievance process, even though "the dispute resolution provision at issue–covering any controversy that might arise–was broad enough to encompass the employees' FLSA claims . . . ." Opp. at 19-20. Respondents later acknowledge, however, that "the *Barrentine* line of cases did not involve an agreement to arbitrate statutory claims, but rather contract-based wage claims arising under the CBA, and thus, the labor arbitrators in these cases lacked authority to resolve statutory claims . . . ." Opp. at 21. As explained in the Petition, one of the principal concerns in *Barrentine*, *i.e.*, the absence of an agreement to arbitrate statutory claims and the corresponding limitation of the arbitrator to deciding only contractual claims, is not present in the instant case. Pet. at 10-11. Another principal concern—the perceived difficulties that a union would have in protecting individual statutory rights—is counterbalanced by other considerations that serve to ensure that unions act in the interests of the employees they represent. Pet. at 12-17. All of the concerns raised by

Respondents are significantly reduced if not entirely eliminated if employees are merely required to exhaust available arbitration procedures as a prerequisite to bringing a court action.[3] Pet. at 12-13.

Respondents' final arguments regarding the alleged disadvantages of arbitration vis-a-vis a judicial forum (Opp. at 27-28) are similarly flawed. A requirement that employees exhaust contractual remedies prior to pursuing their claims in court provides a reasonable accommodation with the interests that undergirded this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and ensures that employees retain the benefits of a judicial forum while also providing them an opportunity to enjoy the substantial benefits that an arbitral remedy can provide. Pet. at 21-24.

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[3] Respondents challenge Albertson's position that an exhaustion requirement would serve both the interest in enforcing agreements to resolve employment disputes through contractual arbitration procedures, and the interest in enforcing individual rights under statutes such as the FLSA. Opp. at 20 n.19. According to Respondents, "[e]ither there is a waiver of the right to a judicial forum or there is not." *Id.* But even if the interest in preserving individual rights to a judicial forum is determined to be so great as to preclude a complete waiver of that right, that would not prevent the imposition of a judicially created obligation to exhaust available contractual remedies before exercising that right.

CONCLUSION

For the reasons stated herein and in its Petition, Albertson's respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit.

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